

AN EXACT
ABRIDGMENT
IN
ENGLISH,

Of the Eleven Books of Reports of
the Learned Sir *Edward Cook*, Knight,
late Lord Chief Justice of ENGLAND,
and of the Council of Estate to his
Majesty, King *JAMES*.

Composed by the Judicious Sir *Thomas
Ireland*, Knight, late of *Graves-Inne*, and
an Ancient Reader of that Hono-
rable SOCIETY.

Wherein is briefly contained the very
substance and marrow of all those Reports,
together with the Resolutions on every CASE.

Also a perfect Table for the finding of the
Names of all those Cases, and the Principal mat-
ters therein contained. Very useful for all
men, especially the Students and Pra-
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Brevitas Memoriae Amica.

The Third Impression.

London, Printed for *George Dawes* over against *Lincolns-
Inne Gate* in *Chancery Lane*. 1666.



*Juris prudentium eloquentissimus
et Eloquentium Juris prudentissimus*

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1568/1567.


30.5.75

B  L



To the Reader.

Gentle Reader,

 He Abridger of these Reports, was not only a learned Lawyer, but also was very conversant with the Author of them: For my part, I was only entreated by many Friends to view and correct the Copy from the Press: If any faults be, you may blame the Printer. If I should commend the Original work, I should disparage the Author,

A 3

who

To the Reader.

whom all learned Lawyers know, that never any man wrote like him : and for the excellency of this Abridgement, it hath in it the very pith and substance of the Reports at large ; and so I rest.

It is an abuse, that the Laws and usages of the Realm, with their Causes, are not written, whereby they may be known, so that they may be understood of all. Mirrour of Justice, fol. 225.

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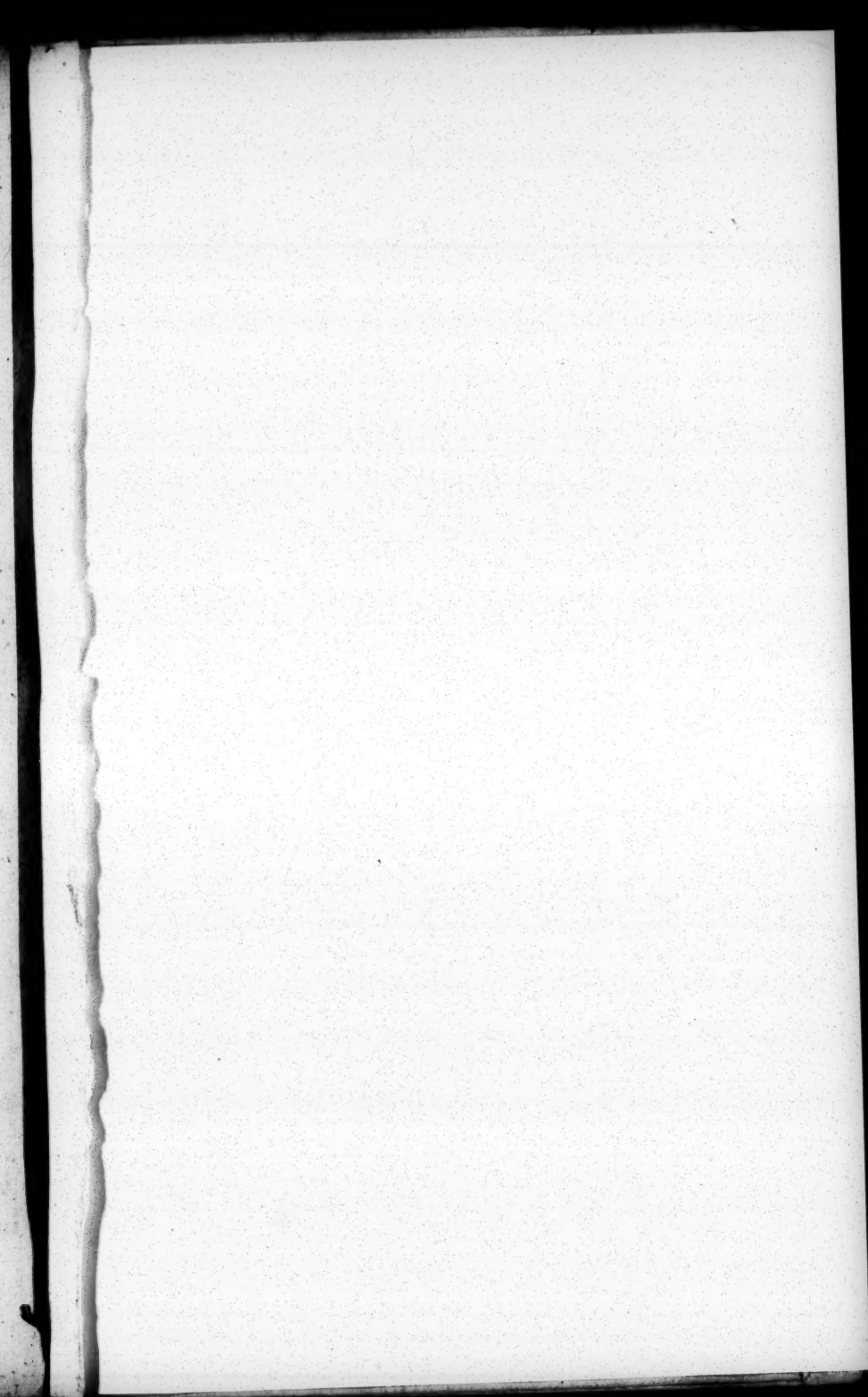
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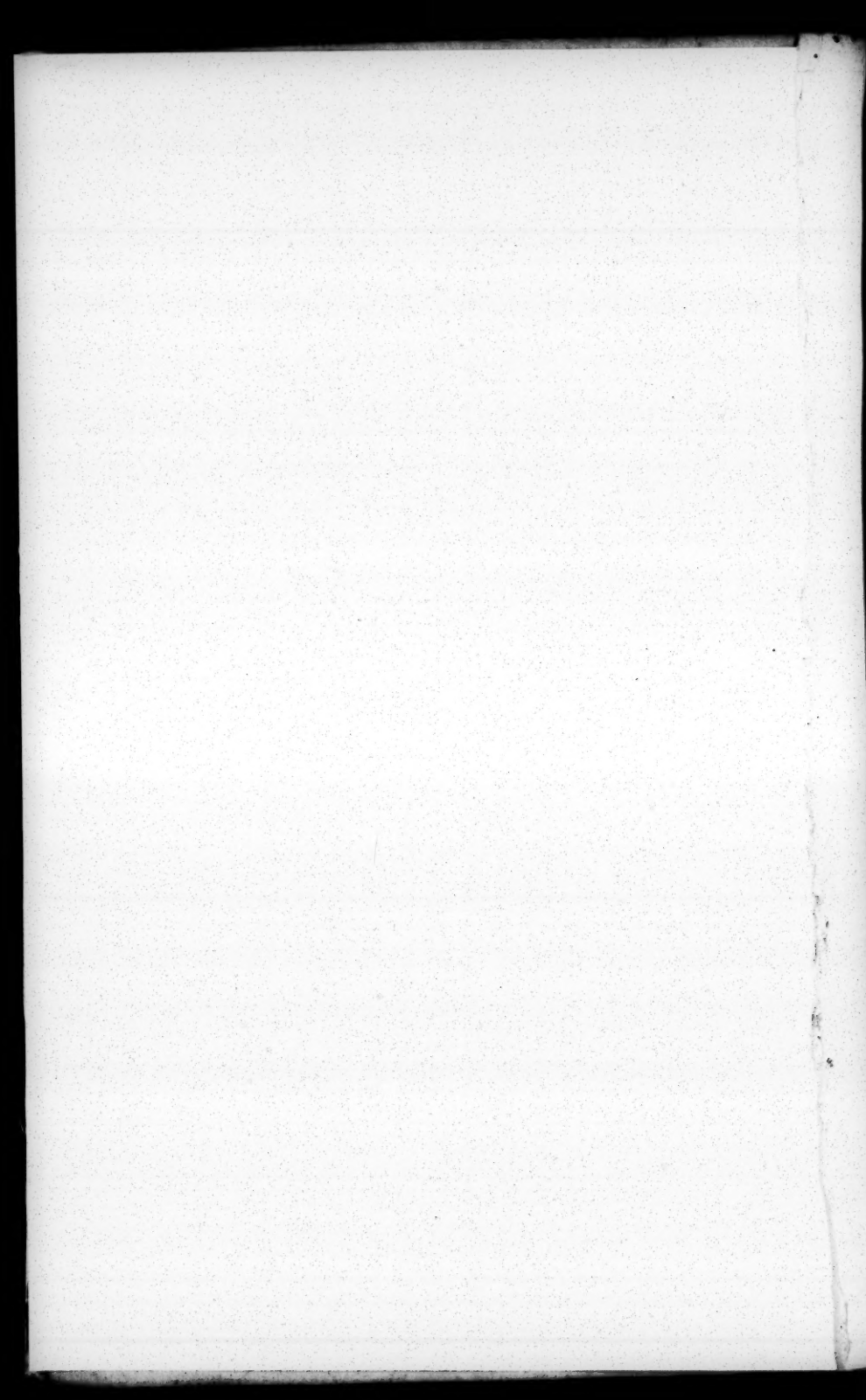
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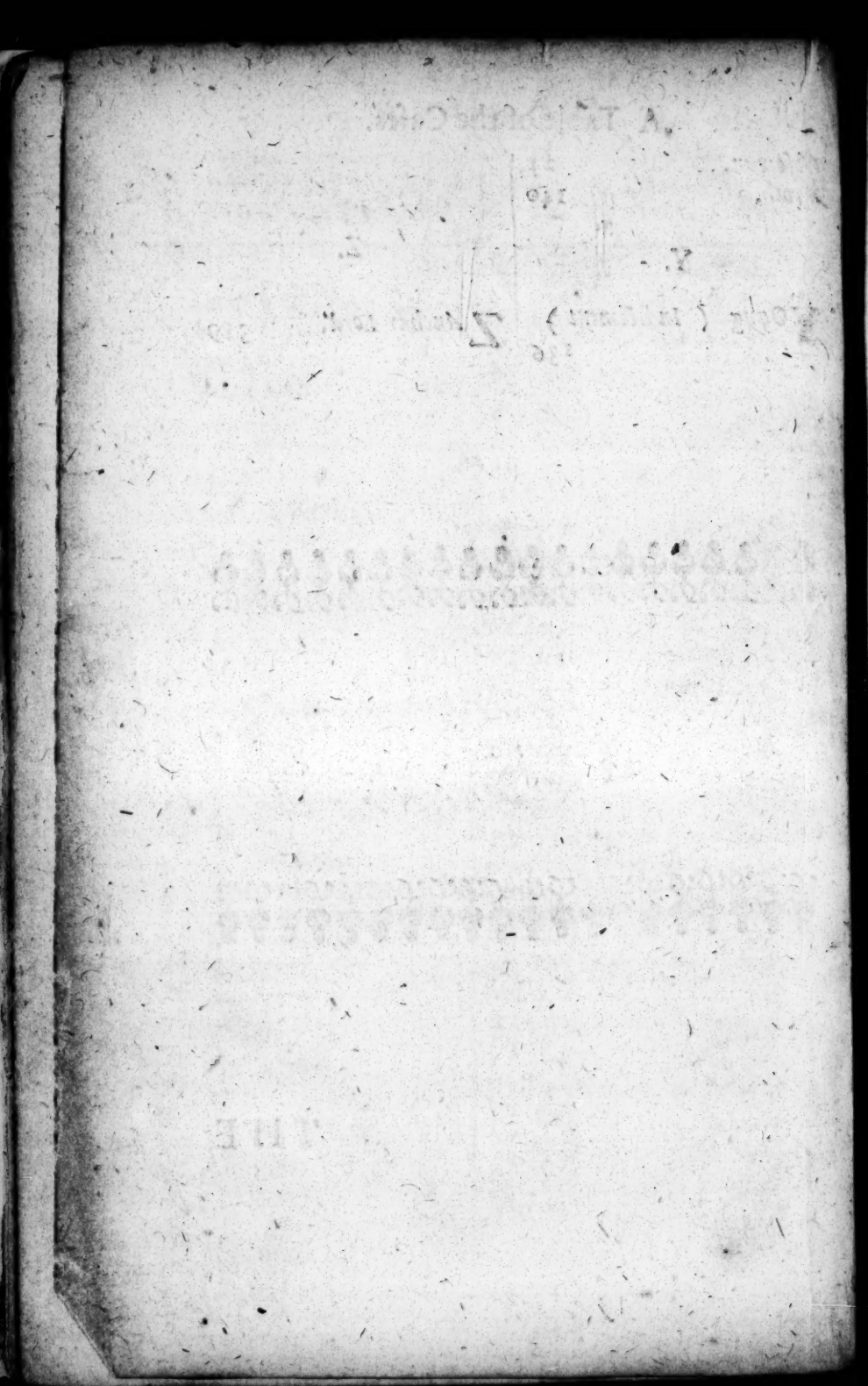
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THE





THE FIRST BOOK.

The Lord Buckhursts Case, 40 El. fo. 1.



F a man for him and his heirs, do warrant land to one and his heirs; this is a general warranty, because there is not a resistant against any particular person in certain.

*Warranty
what words
make it
general*

Upon a Feoffment without warranty, the Feoffee shall have all the Charters, which comprize warranty, and others, though they be not given to him, because he is to defend the title at his peril. Upon a Feoffment with warranty, without express grant, the Feoffee shall not have any Charters which serve for to detain the warranty paramount. Also the Feoffor shall have all Charters, which serve for maintenance of the title; but the Feoffee shall have all which maintain the possession, as Court Rolls, and which are concomitant and incident to the possession.

*from man to
feoffee
warranty
of*

If A. be seised of a Seigniori, rent, advowson, or other thing that lyeth in grant, and grant the same over unto B. with warranty, and B. grant that to C. with warranty; in this case C. shall have the first Deed, although B. be bound to warranty; for without that he cannot make any defence against A. or any claiming by him.

*to whom
warranty
do belong*

Pelhams Case, 32 El. fol. 14.

A Tenant for life, the remainder in tail, the remainder in fee bargains and sells the land to

*the tenant for life
and the remainder*

B

*tenant for life, one what art of
comes in as voucher*

one, who before the statute of 14 *El. cap. 8.* suffers a recovery, in which A. is vouched, and voucheth over, and he in remainder enters, and the entry is adjudged lawful; for the recovery is a forfeiture, and the remainder may enter, for it is the common Assurance; as if tenant for life had levied a fine, &c. and suing of execution, doth not toll the entry of the remainder, and a Writ of Error was sued, and the Plaintiff released the errors.

Porters Case, 35. Eliz. fo. 22.

A man may give Lands to his heirs
if he has issue
H. 8. P. devised a house to his wife and her heirs, upon condition, that she by advise, &c. with all convenient speed, after his death, should assure it, &c. for maintenance of a free School, &c. for ever, and dies. 32 *H. 8.* the wife enters, and 3 *E. 6.* leases to A. for years, the heir of P. enters, and his entry adjudged lawful; because 32 *H. 8.* extends not to good uses, nor doth it make the conveyance void, or give entry, but makes the use void: and admit the use void, yet the condition is not, for Counsel may devise, &c. as to have a corporation by Patent, and license to assure, and therefore the wife ought to have performed it.

Every man at this day may give Lands, Tenements, or Hereditaments to any person or persons for the finding of a Preacher, maintenance of a School, maimed Soulders, poor people, reparation of Churches, High-waies, Bridges, marriage of poor Maids, or any other charitable uses. But it is good policy, in every such feoffment or estate, to reserve to the Feoffor and his heirs any small rent, or to express some small sum of money for the consideration of the cause before recited.

Altonwoods Case, 42 El. fo. 41.

H. 8. Seised of an estate tail to him, and the heirs males of his body, and out of a fee expectant, grants in tail, and dies without issue male; adjudged that the grant is void; for the King had an estate tail in possession, by which he might grant a lawful estate for his own life; and a fee, by which he might grant an estate tail by special recital. And these words (*ex speciali gratia, &c.*) shall not produce a strainable construction against the rules of Law, or in *deceptionem regis*.

Capels Case, 23 Eliz. fo. 62.

A Tenant in tail, the remainder to B. in tail, B. grants a rent-charge, A. suffers a common recovery, and dies without issue, the Grantee distrains, the Alienee of A. brings a Replevin; adjudged for the Alienee by all the Justices of *England*, that a common recovery against a tenant in tail, shall bind not only the remainder, and all leases, charges, &c. granted or made by him in remainder; but also the reversion, and all leases, charges, &c. granted by him in reversion.

Archers Case, 39, 40 Eliz. fo. 66.

L And was devised to the Father for life, the remainder to the next heir male of the Father, and to the heirs male of his body; the devisor dies, the Father infeoffs J. S. with warranty. First, it was resolved by *Anderson and Walmesly, et tot. Cur.* that the Father had but only an estate for life, for that he had an expresse estate for life demised unto him,

and the remainder is limited to his next heir male in the singular number, and his right heir male may not enter for the forfeiture in his life, for he cannot be heir so long as he liveth Secondly, it was resolved, that the remainder to his right heir is a good remainder, although he cannot have a right heir during his life, but it sufficeth that it vesteth *eo instanti*, that the particular estate determineth, *Dyer 14 El. fo. 309*. Thirdly, it was resolved, which was the principal point in this case, *per tot. Curiam*, that by the Feoffment of the tenant for life, the remainder was destroyed; for every contingent remainder ought to vest, either during the particular estate, or at the least, *eo instanti* that the particular estate determineth; for if the particular estate be ended or determined in Deed, or in Law before the contingency fall, the remainder is void. And in this case by the Feoffment of the Father, his estate for life was determined by condition in Law, which cannot be revived by any possibility; for this cause the contingent remainder is void, for by the feoffment no right of the particular estate remaineth; and the better opinion was, that the warranty binds the remainder, though in abeyance.

Bredons Case, 39 40 Eliz. fo. 76.

A remainder
contingent.
destroyed by
feoffment of
tenant for
life

Tenant for life, and the remainder in tail, joyn in a fine *Come ceo, &c.* to A. who renders a rent-charge of 40 *l.* a year, to tenant for life, the remainder dyes without issue, the second remainder in tail enters, tenant for life distrains for the rent; adjudged he may, and that the rent remains after the death of tenant in tail without issue, during the life of tenant for life; the fine was no discontinuance, for every one gave that which he might law-

lawfully give, and 'tis no forfeiture by tenant for life, for the Law construes this, First, to be a grant of him in remainder, and after the grant of tenant for life, *ut res magis valeat, &c.* If tenant for life, and the first remainder in tail make a feoffment, 'tis no discontinuance, though the first remainder in tail dies without issue, nor is it a forfeiture; but the feoffee shall hold it during the life of tenant for life, but if it be without deed, then 'tis a surrender of tenant for life, and the feoffment of the remainder, *ut res magis valeat, &c.*

Corbets Case, 42 Eliz. fo. 84. of Perpetuities.

C. Covenants to stand seised to the use of himself for life, and after to the use of A. his eldest Son, and the heirs males of his body, the remainder to the use of B. his second son, and the heirs males of his body, &c. And if A. or his issue, &c. shall attempt, &c. to alien, &c. by which any estate shall be barred, &c. that after such attempt, and before any act executed, the use and estate of him so attempting, &c. shall cease only as to him so attempting in the same degree, as if he were naturally dead, & not otherwise; and that then it shall be immediately to such persons to whom it should come by the intent of the Indenture, &c. C. dies. A. suffers a recovery, B. enters, &c. adjudged he could not, for this *Proviso* is repugnant, impossible, and against Law, for the death of tenant in tail, is not a cesser of the estate tail, but death without issue males: And by this reason the issue should have it in the life of the Father, &c. And for every descent, &c. death natural or civil is requisite, and 'tis not material, though tenant in tail had no issue at the time of the breach; for 'twas repugnant at the beginning, and the estate tail doth

not commence, by the having of issue, and a gift in tail upon condition, that if the Donee dies, his estate shall cease, is a void condition. Also the *Proviso* is void for the incertainty, as a gift to two, & *heredibus* is void, though a warranty be made to them, and their heirs: and in *Fermine* and *Ascotts Case*, the like *Proviso* was adjudged void; for be the *Proviso* a condition or a limitation, the intire estate ought to be defeated by it, and an estate in land cannot cease for part, and continue for the residue, nor cease for one person, and continue for another; nor cease for a time, and revive after. The like judgment was betwixt *Cholmly* and *Humble*, but the Parliament, or Law, may make an estate void, as to one, and good to another; as tenant in special tail levies a fine, the issue is barred, not the wife; so a release by the demandant to the vouchee is good, not by a stranger; so, if an Executor surrender a term, to one respect 'tis extinct, to another 'tis asserts, &c. And uses are within the statute *de donis*, though it speaks only of Lands and Tenements, and there shall be a *possessio fratris*, &c. of them, for they are guided by the Rules of the common Law. *Richil* in the time of R. 2. and *Thirning* in the time of H. 4. Justices, intended to make a perpetuity, but could not.

Shelley's Case, 23 Eliz. fo. 94.

EDward Shelley leased for years, and after covenanted to suffer a recovery, which should be to the use of himself, and after to the use of A. for 24 years, and after to the heirs males of the body of the said E. S. and the heirs males of the said heirs males, &c. E. S. dies 9 of *Octob.* the first day of the Term, in the morning betwixt five and six a clock, the recovery passes the same day, and an *Habere faci-*

as *seisinam* awarded, the recovery was executed the 19 of *Octob.* 4 *Decemb.* the wife of the eldest Son (before dead) of E. S. was delivered of a Son, named *Henry*; *Richard*, the second son of E. S. entered, and made a Lease, &c. *Henry* entred upon the Lessee, who brought an *Eject. firme*, and judgment was given for the Defendant; and 'twas resolved, that if tenant in tail suffer a common recovery, and dye before execution, that execution may be sued against the issue, for the intended recompence, in favour of the common assurance. Resolved that the reversion in judgment of Law, is not in the recoveror before execution sued, for the judgment is, *Quod recuperet seisinam*, which cannot be executed till entry or claim, as 'tis of a Common, &c. granted upon condition, for when a man may enter, or claim, the Law will not put things in him, till entry or claim. The third and great point resolved, was, that the Uncle is in, as by descent, though he shall not have his age, nor be in ward; 1. Because the recovery being the Original act, had its essence in the life of E. S. to which the execution hath retrospect. 2. Because the use might have vested in E. S. if he were in life. 3. Neither the recoverors by their entry, nor the Sheriff by making execution, may make an Inheritance to whom they please. 4. Because the Uncle claimed the use by the recovery and Indenture, and by words of limitation, not purchase.

Albanies Case, 28 Eliz. fol. 11.

A. By Indenture infeoffed B. of two Acres, to the use of A. for life, the remainder in tail to C. the remainder in fee to D. with a *Proviso* if E, dye without issue, that A, at any time by Indenture sealed, &c. *in his age or be in ward*

in the presence of four, &c. may alter, &c. any use, &c. A. of the one Acre infeoffs F. and for the other Acre; A. by Indenture renounces, surrenders, releases, &c. to B. C. and D. the said power, condition, authority, &c. E. dies without issue, A. by Indenture in presence of four, revokes the first uses, and limits new. Resolv That by the feoffment, the power to revoke, as to limit new uses, was extinct, and by *Wray* Chief Justice, the future power may be released as a condition subsequent, though the performance or breach cannot be done without an act precedent; but as to this point, the Court did not give their resolution; but the whole Court agreed, that if the power had been present (as 'tis usual) this might be extinct to any one, who hath a freehold in possession, reversion, or remainder. 'Twas moved (if the future power could not be released) whether it might be defeated by the words of defeasance, both being executory; and 'twas said, that in all Cases, when any thing executory is created by a Deed, that the same thing, by consent of all parties to the creation, by their Deed may be nullified, as a warranty, recognizance, rents, charge, annuities, covenant, &c. And of the same opinion was *Wray* ch. Justice, and the whole Court; and judgment given according.

Chudleighs Case, or the Case of Perpetuities,
fol. 120.

SIr Richard Chudleigh was seised in fee of the Manor of D. and had issue four sons, A. B. C. D. and 26 April, the third and fourth of Philip and Mary, infeoffs E. F. &c. in fee, to the use of himself, and his heirs of the body of G. then wife of H. and after to the use of the performance of his Will,

Will, for ten years immediately after his death, and after to the use of the feoffees, and their heirs, during the life of A. the eldest Son, the remainder to the use of the first issue-male of the body of A. and the heirs of the body of the first issue male; and so to the second issue male, the remainder to the use of B. the second Son, and the heirs of his body, the remainder to C. &c. the remainder to D. &c. the remainder to the right heirs of himself. Sir *Richard Chudleigh* died without issue of the body of G. 10 of the Queen, the feoffees (C. living) by Deed infeoffed A. in fee, without consideration, he having notice of the first uses. A. hath issue a Son, named S. and after I. and after infeoffs Sir I. C. with warranty, S. died without issue, &c. I. enters, &c. agreed by all the Justices and Barons but two, that the feoffment made by the feoffees (which had an Estate for life) devests all the estates, and the future contingent uses also; and though A. had notice of the first use, 'tis not material, because the ancient uses were devested, and this new estate cannot be subject to the ancient uses, which rose out of the ancient estate, agreed that 27 H. 8. doth not extend to destroy uses, otherwise than by execution, and transferring the possession to them, agreed by the most, that 27 H. 8. doth not transferr the possession to any use, but only to uses *in esse*, which doth appear by the statute, for there ought to be a person *in esse* seised, and also a use *in esse*, for if there be only a possibility of a use, there cannot be an execution of the possession to the use; the statute sayes, *That the estate shall be out of the feoffees, and that the estate shall be in such person which hath the use.* So that no estate of the feoffees shall be transferred in obedience; and upon this 'twas concluded, that contingent uses, or in possibility, may be destroyed or discontinued; before

fore that they come *in esse*, as they might at common Law; so the remainders limited in use here, shall follow the rule and reason of Estates executed in possession by the common Law; and if the estate for life here had been determined by death, before the birth of the Son, the remainder in future should be void, though the Son were born after, for a remainder ought to vest during the particular estate, or *eo instante*, when it ends. And 'twas holden by all, that if the contingent use here had come *in esse*, without alteration of the estate of the land, it should be executed by the statute of 27 H. 8. Also it was holden by most, that 27 H. 8. against the express Letter of it, shall not be taken by equity, because by preservation of contingent uses, mischiefs intended to be prevented, shall be preserved, and greater introduced. Popham Chief Justice said, that by 27 H. 8. some uses *in esse* are executed presently: uses *in futuro* agreeable to Law, are executed if they come *in esse* in due time, but uses not agreeable to Law are extirpated; for the intention of the statute was, to restore the ancient common Law. Five other points adjudged; besides the principal matter.

1. When tenant for life (the remainder being in tail to A.) infeoffs the reversioner, 'tis a forfeiture, for it devests the estate in remainder; so if there be tenant in tail, the remainder in tail, &c. and the diversity is, when the privity and estate is sole and immediate, when not.
2. If A. hath issue B. and C. Infants, and a lease is made to A. for life, the remainder to B. in tail, the remainder to C. in tail. A. is disseised, and releases to the disseisor with warranty, and dies, this descends upon B. within age. B. dies, the warranty descends upon C. within age, C. comes to full age, and three years after enters, his entry is lawful, for he might enter in the life of his Ancestor,

stor, and if he doth not enter, yet the warranty shall not bind him; otherwise it is, when he is put to action, and *Caveats*, that after his full age he doth not suffer a descent before entry. 3. If a disseisor, &c. who hath a defeasible title in a Mannor, grant a voluntary estate by Copy (being forfeited, or escheated to him) this grant shall not bind him that hath right, after a recontinuance of the Mannor; but admittances, which a disseisor, &c. makes to Copy-holds are good, for they are in a manner judicial acts, and shall bind the disseisee. 4. That an estate made to one and his heirs, during the life of B. is but an estate for life, upon which a remainder may depend. 5. That an estate made to A. and his heirs of the body of *Jane S.* is an estate tail, against the opinion of *Ascough*. 20 H. 5. 36.

Anne Maiows Case, 35 Eliz fo. 146.

FEoffor and Feoffee upon condition, by Deed joyn in a grant of a rent-charge to C. the condition is broken, the Feoffor re-enters, the grantee distrains, the Feoffor brings a Replevin. Resolved, that the rent remains; to the Objection, that 'tis the grant of the Feoffee, and the confirmation only of the Feoffor, and a confirmation cannot make a conditional estate absolute, nor alter the quality of it, except it enlarge it: As if a Feoffor confirm the estate of the Feoffee upon condition, before the condition broken, it doth not make it absolute. Answered and agreed by the Court, that there is a diversity, when the estate of him, to whom the confirmation is made, is upon an express condition; there the confirmation doth not toll the condition; but if such a Feoffee infeoff another without condition, there a confirmation to the second Feoffee extincts the condition.

Feoffee

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1. When tenant for life (the remainder being in tail to A.) incloses the reversioner, 'tis a forfeiture, for it divests the estate in remainder; so if there be tenant in tail, the remainder in tail, &c. and the diversity is, when the privity and estate is sole and immediate, when not.
2. If A. hath issue B. and C. Infants, and a lease is made to A. for life, the remainder to B. in tail, the remainder to C. in tail. A. is disseised, and releases to the disseisor with warranty, and dies, this descends upon B. within age. B. dies, the warranty descends upon C. within age, C. comes to full age, and three years after enters, his entry is lawful, for he might enter in the life of his Ancestor,

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Feoffee

feoffee upon condition grants a rent in fee; the feoffor confirms it to him and his heirs, and after enters for condition broken, yet the rent remains, and by *Littleton* every fee-simple land may be charged one way or other, *Concurrentibus his, &c.* and the case *11 H.7* is all one with our case, and here 'tis the stronger, because the grant and confirmation were by the same Deed, so that the rent was never subject to any condition.

The Rector of Chedingtons Case, 40 Eliz. fo 153.

2 *E. 6.* the Rector of *Ched.* demised the Rectory to *El. Elderker* for 80 years, if she should live so long, and if she dyed within the said term, or aliened, that then her estate should cease, and then by the same Indenture demises the premises to *R.F.* for so many years as shall remain unexpired after the death or alienation of *El.* for the residue of the term of fourscore years, if he shall live so long, without alienation, &c. And if he dye, or alien within the said term, then his estate shall cease; and then by the same Indenture he grants the premises to *W.* for so many years of the said term of fourscore years, as remain, if he lives without alienation, and if *W.* dies, or aliens within the said term, that his estate shall cease, and then he grants, &c. during so many of the fourscore years, which shall be unexpired to *T.* his executors and assigns, which Indenture and estate was confirmed by the Patron and Ordinary; the Rector dies, *T.* dies, *W.* dies, and *17 Eliz. Elderker* dies, after *R.* enters, and dies, *18 Eliz.* the executor of *T.* enters, and assigns to *J. S.* the successor of the Rector enters, and leases to *B.* who upon ouster, brought an *Ej. firmæ.* Resolved for the Plaintiff, and that the lease to *T.* is void. Argued for *T.* that his demise

demise was good, and a difference taken betwixt *terminum annorum*, and *tempus annorum*, as in this case of the demise to T. during so many years of the fourscore years. &c. not of the term of fourscore years; if a lease be made for 21 years, and after another lease, to commence from the end and expiration of the said term of year, and after the first lease is surrendered, the second term shall commence presently, not so, if it were from the end of the said 21 years. Resolved, that the demises to R. and W. are void, because the term that *El.* had, was *sub modo*, if she should so long live, which is determined by her death, *ergo*, no residue can remain to R and W. and so 'twas adjudged between *Green* and *Edwards*, and the Court agreed the diversity betwixt the demises to R and W. and the demise to T. 'twas argued that the demise to T. was void. 1. Because that the Lessor had not power to contract for the land during the fourscore years, for he had but a possibility to have the land again during the fourscore years, *viz.* if *El.* dyed, which possibility cannot be demised, but the Court delivered no opinion to this point. 2. That the lease to T. was void, for the uncertainty how many years should be behind, at the death of *El.* a termor grants to B. so many years as shall be behind *tempore mortis sue*, 'tis void. *Lacrofts* case adjudged, a man possessed of a term of 90 years, upon marriage of his Son, demised the land to his Son for 70 years to commence after his death, the Lessor dies, the lease was adjudged good, because here he demised the land for 70 years, which is certain, in which this differs from 7 E 6. which diversity was agreed by the whole Court. 2. That 'twas void, because he died in the life of *El.* so that the incertainty cannot be reduced to a certainty in his life time, and so cannot rest in the executors, a lease to one for so many

many years, as his Executors shall name, is void. *Note*, a diversity betwixt a covenant and agreement; which is perfect and certain, though it takes effect in possession, upon a future matter precedent; and a covenant and agreement incertain, which is to be reduced to a certainty by matter *ex post facto*, for in the first case, the estate is bound presently, in the other not, which was agreed by the Court. 4. It was moved, if T. had been in life, the demise could not rest in him; T. dyed before R. or W. and R. survived *El.* and by the expresse condition precedent, R. could not take, except *El.* dyed within the term, and W. could not take, except R. dyed within the term, and this is as much as to say, that if R. dies before *El.* and T. cannot take, except W. die in the life of *El.* and R. survived *El.* So that both precedent contingencies fail, *viz* the death of R. and W. in the life of *El.* and though the demise to R. and W. are void, yet the limitation precedent (*viz* the death of R. and W. in the life of *El.*) to the demise to T. is not void, for his interest may depend upon both the contingencies, for so was the intention of the parties, and this was affirmed by the whole Court, by *Popham* Chief Justice. The lease to T. was void for another cause; for it cannot commence upon a contingent, which depends upon another contingent, as here the demise to T. depends upon the contingent annexed to the demise made to W. and the demise to W. depends upon a contingency annexed to the demise to R.

Digges Case, 42 Elit fol. 173.

C. *Digges* was seised of the land in question, and other lands in fee, and by Indenture 6. *Mai* 10. of the Queen covenanted (in consideration of marriage betwixt him and his wife, and for the advancement

vancement of T. their Son, and for two hundred pounds paid to him before marriage) that he and his heirs would stand seised to the use of himself for life, and after to T. in tail; and after to the use of himself in tail; with a *Proviso* (for the considerations aforesaid, &c.) that it should be lawful for him at any time during his life, with consent of certain persons, by Indenture to be inrolled in any of the Kings Courts, to revoke any of the uses, or estates, and for to limit new uses. 6 *Maii* 12 of the Queen, C by consent, &c. by Indenture inrolled in the Chancery, revoked the uses and estates aforesaid, in part of the land, and limited the use of it to him and his heirs, after 20 *Sept.* 13 of the Queen, by Indenture with consent, &c. inrolled in Banck; M. 13 and 14 of the Queen, declared, that for the payment of his debts, that from the time of the inrollment of this Deed in Chancery, all the uses in the first Indenture should be void, and that the land should be to the use of himself in fee; after C. 26 *Octob.* 14 of the Queen by Indenture covenanted for to levie a fine of all his land, part of which should be to the use of himself and his wife, and his heirs, which fine was levied the same term, after the Indenture dated 20 *Sept.* was inrolled in Chancery, after C. enters, and makes his claim; and whether C. idyed seised in fee of the land mentioned in the Deed of Revocation of 20 *Sept.* was the Question. Adjudged, 1. That C. D might revoke part at one time, part at another, till he had revoked all; but he can revoke the same part but once, except that he have a new power, &c. to uses newly limited, for these words (*at any time*) amount to (*from time to time*, &c.) 2. That where the revocation is to be by Deed indented to be inrolled, this is as much as to say, as by Deed indented and inrolled, and till inrolment no revocation shall be,

be, for otherwise perchance none shall be inrolled. 3. That was no perfect revocation by the Indenture of 20 Sept. till the Deed were inrolled in the Chancery, for though that the *Proviso* of revocation in the first Indenture shall be satisfied with an inrollment in any of the Kings Courts, yet for that the Indenture of revocation it self, limits the revocation to take effect after the inrollment in Chancery, it ought to be so. 4. That the fine levied before the inrollment in Chancery (which was before the revocation) hath extinct the power; see *Albanies Case* before adjudged, and *Popham* Chief Justice said, that without question such a power might be released; for 'tis not meerly collateral, but favours and tastes of the estate of the land, which all the Court agreed. 5. If the fine had not been, the ancient uses were determined, without entry or claim, because he himself was tenant for life of the land, and the act of revocation is as strong as claim; and this point was agreed in the *Earl of Salops Case*. 6. By the same conveyance that the ancient uses are revoked, others may be raised, without claim, or other act, and the Law adjudges a priority of operation. *Whites Case* adjudged according.

Mildmayes Case, 24 Eliz. fol. 175.

A Use cannot be raised by any Covenant, *Proviso*, or bargain, &c. upon a general consideration, and therefore if a man by Deed indented & inrolled, &c. for divers good causes and considerations, bargain & sell his land to another, and his heirs, *nihil operatur inde*, for no use shall be raised upon such general considerations; for it doth not appear to the Court, that the Bargainor had *quid pro quo*. But the Bargainee may averr, that mony, or other valuable consideration was

was paid or given, if in truth it was so, and the bargain and sale is good.

It was resolved, that when uses are raised by covenant in the consideration of advancement of any of his blood, and after in the same Indenture a Proviso that the covenantor may make leases for years, &c. that the Covenantor in this case may not make leases for years to his son, daughter, or any of his blood, much less to any other person, because that the power to make leases for years was void, when the Indenture was sealed & delivered. For the Covenant upon this general consideration will not raise any use, and no particular averment in this case may be taken; but if the uses be limited upon a recovery, fine, or feoffment, there needeth not any consideration to raise any of the uses. Resolved, that the words (*other consideration*) cannot comprise any consideration expressed in the Indenture before the Proviso, for (*other*) ought to be in quality, nature, and person, different; and advancement of his daughter, is a consideration mentioned before.

Anthony Mildmay brought an action of the Case against Roger Standish, for saying that lands were lawfully assured to Jo. Talbot for 1600 years, and that he was lawfully possessed of the said term; whereas in truth the said lands were not lawfully assured for the said term, nor the said Jo. Talbot was lawfully possessed of the interest thereof. And so for flandering of the title by speaking of the words, Mildmay brought an action; Standish justified the words, & shewed the title of Talbot, and it was adjudged that the action was maintainable & good, although that Talbot had a limitation of the land by will, which was the reason that

C

Standish

*action upon y^e
case where
it lyeth for
the wrong
y^e p^{ty} is
wth fo: 108-9*

Standish (being a man not learned in the laws) affirmed the words; yet because he took upon him the notice of the Law, and medled in a matter that did not concern him, Judgment was given for Mildmay, Et ignorantia Juris non excusat.

The End of the First Book.

THE



THE SECOND BOOK.

Of Sir Edward Coke, Lord, &c.

Mansets Case, 26 Eliz. fo. 3.

F a man be unlearned and cannot read, and be bound to do an act of sealing assurances, writings, &c. he is not bound to seal and deliver any such writing, if there be not some ready which may read the Deed if the party so require it; and in the same language and tongue that he understandeth, *Ignorantia duplex est, Facti & juris*, and ignorance in reading, or of the language, *quæ sunt ignorantia facti*, may excuse; but, *ignorantia juris non excusat*, and if it be read unto him, he may not have a reasonable time to shew it to his Councel learned, to see whether it agree with his Bond or Covenant, for he must seal it at his peril, or if the same be truly expounded to him, it is good enough. But if it be read amiss, or declared contrary to what it is, and thereby the illiterate man is deceived, he may very well plead *non est factum*; For the Law saith, it is not his Deed, & so it was adjudged in *Thoroughgoods Case*, being the third Case in this second Book. Resolved, that if a man be bound that a Stranger shall do an act, in such case he takes upon him, that he shall do it at his peril: for he which is bound takes more upon him for a stranger, than for himself in many Cases. If a man plead that he hath

kept a man indemnified, &c. he ought to shew how ; otherwise, where he pleads in the Negative, *Non fuit damnificatus*.

Goddards Case, 26 Eliz. fo. 4.

AN Obligation, dated the fourth of *April. An. 24 El.* and delivered as the Deed of the party, *30 July An. 23 El.* adjudged the deed of the party ; for though the Plaintiff in pleading cannot alledge the delivery before the date, because he is estopped, yet a Jury which are sworn to speak the truth, shall not be estopped. The date of a Deed is not the substance of the Deed. For if it want date, or have an impossible date, as the *30 February*, the deed is good. For there are three things of the essence or substance of a Deed (*Viz.*) writing in paper or parchment, sealing, and delivery. And if it have these three, although it want, *In cujus rei testimonium Sigillum suum apposuit, &c.* yet the Deed is good ; and when a Deed is delivered, it takes effect by the delivery, not by the date.

Thoroughgoods Case, 26 Eliz. fo. 9.

RESolved, That 'tis not material, whether the party to whom the deed is made, or another by his procurement, or a Stranger of his own head, reads the writing in other words than the writing is, so that he that seals it be a lay man, and (without covin in him) deceived ; and the pleading of it is always general, without shewing by whom 'twas read ; and A. shall avoid an obligation to B. by pleading, that he did it by menace of C. Resolved, that such a lay-man is not bound to deliver a Deed, if no body be present that can read it in such language as he can understand,

stand, and if it be read in other words, it shall not bind him, and 'tis at the peril of him to whom 'tis made, that the very effect and purport of it be declared if it be required, but if he do not request it, he shall be bound by it, though it be made contrary to his meaning. Resolved, that it shall not bind if the effect be declared in other words then it is, as if the Deed had been read in other words. Two Justices, a feoffment of two Acres, is read as of one, it shall not bind : see *Mansers Case* before.

Wisemans Case, 27 Eliz. fo. 15.

TENANT in tail of certain lands, the remainder to another in fee, he in remainder by Deed indented and inrolled in consideration of blood, &c. as for other good considerations, doth Covenant to stand seized of the said lands to the use of himself, and of the heirs males of his body. And for default thereof to the use of the Queen, her heirs and successors. After the Tenant in tail in possession suffereth a common recovery with voucher. And whether it was a bar to the issue in tail was the question ; And it was adjudged that the issue in tail was barred, for good considerations are too general to raise any use without special averment, that valuable or other good consideration was given. Resolved, that the land should continue in his name and blood, is not a consideration to raise a use to the Queen, though the limitation to her were for the preservation of the Tail, against discontinuances and bars, for there wants *quid pro quo*. Resolved, if he had said in consideration, that the Queen is the head of the weal-publique, and hath the care and charge, as well to preserve peace, as to repel hostility, yet 'tis no good consideration ; for Kings *ex officio*, ought to go-

vern their Subjects in tranquillity, which is implied in the word (*King.*) And, admit the consideration had been sufficient to raise a use to the Queen, yet that would not preserve the estate tail by force of the Act 34 H. 8. For no estate tail is preserved by the said Act, except the same estate tail be of the creation or provision of the King, and not where the estate tail is given or created of a common person without provision of the King, as may appear by the preamble of the Act. Resolved, that before the statute of 34 H. 8. a common recovery barred a Tail created by the King.

Lanes Case, 19 Eliz. fo. 16.

THE Queen seiled of a Mannor in right of her Crown, by her Steward granted Copy-hold lands; parcel thereof to one by Copy, according to the custom in fee. And after the Queen under the Exchequer Seal, made a lease of the same lands to another for 21 years, who granted the same Term to the Copy-holder; and after the Queen reciting the lease for years, granted the reversion thereof in fee: the term of 21 yeares expired, the Patentee of the reversion entred upon the Copy-holder, and the entry was adjudged good. Resolved, that the lease under the Exchequer Seal was good by the usage there; for the course of every Court is as a Law, of which the Common-law takes notice, without alledging of it in pleading; and every Court at *Westminster* is bound to take notice of the Customes of other Courts, otherwise of Courts in the Country: and the order of Exchequer is to make leases by (*committimus* such land.) Resolved, that the estate of the Copy-holder was determined by the acceptance of the lease for years; and so it was adjudged against

gainst the Copy-holder, notwithstanding that the Copy-holders estate is taken to be but an estate at will, yet the custom hath so established the estate of the Copy holder, that he is not removeable at the will of the Lord, so long as he performs his customs and services : and by the same reason the Lord cannot determine his interest by any act that he can do. And so it hath been adjudged many times. And the acceptance of this lease was the proper act of the Copy-holder. Resolved, that by the severance of the Free hold from the Mannor, the Copy-hold estate is not extinguished.

Baldwyns Case, 31 Eliz. fo. 23.

THings which lie in grant, and take the essence and effect by delivery of a Deed, without other Ceremony, as rent or common out of lands, &c. by the premises of the deed to one and his heirs, *habendum* to the Grantee for years or life ; this *habendum* is repugnant to the premises, for the fee passeth by the premises by the delivery of the deed, and therefore the *habendum* is void. And when a man giveth lands by deed in Fee by the premises, *habendum* to the lessee for life, there the *habendum* is void ; and when livery is made, the effect of the deed shall be taken the more strongly against the feoffor, and the best for the feoffee.

When a Ceremony is requisite to the perfection of an estate in the premises limited, and to the estate limited in the *habendum*, no Ceremony is requisite but only the delivery of the Deed, although the *habendum* be of meaner estate than the premises, the *habendum* shall stand good and qualifie the generality of the premises, as a fee granted in the premises, *habendum* for years ; it is for years, and no inheritance,

ritance. *Note*, There is a diversity betwixt the estate implied in the premises, and expressed; as if A. grant a rent to B. this is an estate for life, but if the *Habendum* be for years, this is good, and qualifies the implication of the premises.

Case of Bankrupts, 31 Eliz. fo. 23.

RESolved, That a grant or assignment of goods by a Bankrupt after the Commission awarded, which is matter of Record, of which every one ought to take notice, and though to a Creditor, in satisfaction of debt, is void, and that a sale of such goods by the Commissioners, is good. Which sale by the statute of 13 of the Queen, ought to be equal, to every one *rate and rate like*, according to the quantity, &c. And the Court resolved that the Proviso in the said statute, concerning gifts *bona fide*, doth not make any gift good, but excludes them out of the penalty, &c. Commissioners may sell by deed, without enrolment, and though they have not seen the goods, agreed, that the distribution ought to be several, not joint, for the one debt may be greater than the other, and in this case the Jury found, that the Commissioners sold the goods to three Creditors jointly, but further, that the Bankrupt was indebted to them in 273 pounds, which shall be intended a joint-debt, and so good: resolved, that the act giveth benefit to such as will come, and not to them that refuse, & *vigilantibus, & non dormientibus, jura subveniunt*; and every Creditor may take notice of the Commission, being matter of Record.

Bettisworths Case, 33 Eliz. in Communi banco. fo. 31.

A Lease for years was made of one Messuage, one Close called *Raynolds*, and of divers other lands in

in Dale, and afterwards (the Lessee being in the house) the Lessor entred into the same Close, and maketh a feoffment of the Messuage, and of the lands therewith demised, and maketh livery in the same Close, and afterwards the lessee re-entreteth into the said Close. And if this was a good feoffment and livery of seisin of the said Close, (the lessee nor any for him being in the said Close) was the question. And it was adjudged, that the livery and seisin was void, as well for the Close as for the Messuage, and the other land therewith demised ; For the possession of the Messuage which is his Castle, is a good possession of the lands therewith demised ; and it matters not, whether livery be made on the land within view of the house, or not. When a man maketh a feoffment of a Messuage *cum pertinentiis*, he departeth with nothing thereby, but that which is parcel of the house, as Buildings, Curtelage, and Garden.

If a Lessee for years makes a Lease for a certain Term of any parcel, and so divides the Possession thereof from the residue (if of this parcel so severed) livery be made, the possession in the residue by the first Lessee, is not any impediment to the livery of this parcel ; otherwise if a Lessee make a lease at will of any parcel, there his possession of the residue shall hinder the livery made in this parcel ; and with this judgement agreed all the other Justices, and Serjeants of Serjeants-Inne in Fleet-street.

Doddingtons Case, 27 Eliz. fo. 32.

King H. 8. *Ex certa scientia, &c.* granted to A. for
300l. *Omnia illa Messuagia in tenua Johannis Brown*
Situate in Wells, nuper Prioratini de W. spectant.
And

26 Sir Rowland Heywards Case. Lib. 2.

And in truth the lands lie in D. in this Case 'twas resolved that the Grant was void by the Common-law, as well in case of a common Person as the King, because the Grant is general, and is restrained to one certain Village, and the Grantee shall not have any lands out of that Village, to which the generality of the Grant is referred; for this Pronoun *Illa*, hath his necessary reference as well to the Town, as to the tenure of I. B. for if either the one or the other fail, the Grant is void. And so it was adjudged, *per tot. cur. de Banco Regis*. Resolved also, that this Grant was not holpen by the statute of 34 H. 8. For no Grants are holpen by this statute, nor by any Act of Confirmation, but such as comprehend convenient certainty. 1. *Quia generale nihil certum implicat*. And here no Tenements are mentioned to be granted, because the general Grant being in-true, was referred to a falsity, and therefore it cannot be said that the Town was mis-named; and great inconvenience would follow, if, &c. for the King should be deceived, but the statute helps when there is convenient certainty: as a Mannor, Farm, Land, known by a certain name, or containing so many Acres, &c. So that it may appear what things the King intended to pass. Note, 'Tis the most sure way for the Patentee to express as much as he can in certainty, before the general words.

Sir Rowland Heywards Case, 14 cur. Wardor. 37
Eliz. fo. 35.

Sir Rowland Heyward leased of a Mannor in demise and rents, in consideration of money, doth demise, grant, bargain, and sell to A. the said Mannors, Lands, Tenements, and the reversions
 and

and remainders, with all rents reserved upon any demise, to have and to hold to A. and his Assigns after the death of the lessor for seventeen years rendring a Rose; the Indenture was inrolled, and after the lessor by Indenture doth Covenant with B. to stand seized of the premises, to the use of himself and the heirs of his body, and no Attornment was made to A. The Question was, What passed to A? and it was resolved by *Popham* and *Anderson* Chief Justices and the Court, that A. may have his election, either to take the same by demise at the Common-law, or by bargain and sale, *Per Statutum* 27 H. 8. without attornment, for it was one intire demise, and bargain of one Mannor without any fraction or division thereof, and this election remaineth to A. and his Executors and Assigns: for here is not election, to claim one of two several things by one Title, but to claim one thing by one of the two several Titles, for where the things are several, nothing passeth before Election, and the Election must precede; but when one thing passeth, the election of the Title may be subsequent. For if I have three Horses, and do give to you one of them, the property commenceth by Election, and must be made in the life of the Parties.

The Bishop of *Sarum* had a great Wood of 1000 Acres, called *Berewood*, and infeoffed another of one House, and seventeen Acres, parcel of the Wood, and made livery in the Wood-house; nothing passeth of the Wood before Election, and the heir of the feoffee may not make Election. *Bullocks Case* 10 *Eliz.* *Dyer.*

In case where election is given of two several things, he which is the primer Agent, and that ought to do the first act, shall have alwayes the Election. As if

a man grant a rent of twenty shillings, or a Robe, the Grantor shall have the Election, for he is the primer Agent, either by paying the one, or delivering the other. If a man make a lease rendring twenty shillings or a Robe, the lessee shall have the Election, *Causa qua supra*. But if I give unto you one of my Horses in my Stable, there you shall have the Election, for you are the primer Agent, by taking or seising one of them, and so of twenty Trees in my Wood. Note for elections these diversities. 1. When nothing passes to the Grantee, &c. before the Election, there it ought to be made in the life of the parties; but when the estate passes presently, &c. the Grantee, &c. his Heir or Executor may elect. 2. When the same thing passes and the Donee, &c. hath election, in what manner, &c. he will take it, the Donee, Heir, or Executor may elect. 3. When Election is given to several persons, the first shall stand. 4. When Election is given of two several things, he which ought to do the first Act, shall have election. 5. When the thing granted is annual, and to have continuance, there the election remains to the Grantor (in case, where the law gives him election) as well after the day as before, otherwise 'tis, when the thing is to be performed *Unica vice*. 6. The Feoffee, &c. by his act may forfeit his Election; as if A. infeoff B. of two Acres, *Habendum*, the one for Life, the other in Tail, and he before election makes a feoffment of both, here the Feoffor shall enter in which he pleases, for the wrong of the Feoffee. 7. Though the lessees here enter generally, yet they may elect after: so, if one be Executor and devisee of a Term, and enters generally, &c. and after the lessees in the principal Case, made Election, for to take by bargain and sale, and had the rents.

*The Bishop of Winchester's Case, 38 El. fo. 43.
In a Prohibition.*

RESolved, That at Common-law, none had capacity to take Tithes but spiritual persons, or *Persona mixta*, as the King, and regularly no meer Lay-man was capable of them (except in special Cases) for he could not sue for them in Court Christian; and regularly a lay-man had no remedy for them till 32 H. 8. A lay-man may be discharged of Tithes at the Common-law by Grant, or by Composition, but not by Prescription; for it is commonly said in our Law-books that a lay-man may prescribe, *In modo decimandi*, but not *In non decimando*: And the reason is, because he is not (except in special Cases) capable of Tithes at the Common-law, before the statute of 32 H. 8. cap. 7. And therefore without special matter shewed, it shall not be intended that he hath any lawful discharge, and in favour of the Holy Church (although it may have a lawful commencement) the Law will not suffer this Prescription, *In non decimando*, to put it to the tryal of lay men, which sooner will strain their conscience for their private benefit, than render to the Church the duty which belongeth to it.

A spiritual person that was capable of Tithes at the Common-law in Pernancy may prescribe to be discharged of Tithes generally, or to have a portion of Tithes in the land of another.

Before the Council of *Lateran*, every man might give his Tithes to any spiritual person that he would; and if the lands of the Bishop were discharged in his hands absolutely by prescription, the demising it to a lay-man cannot make it chargeable, and the Bishop might reserve the greater Rent.

And

30 *The Bishop of Winchester's Case.* Lib 2.

And in discharge of Tithes , the Judges of our Law do know, that the Ecclesiastical Judges will not allow any such allegation, and therefore a Traverse, *Absq; hoc quod Judices placitum &c. recusarunt*, is insufficient, for the refusal is not material, for the party might have a Prohibition before any Plea pleaded by him, but in some case the refusal is traversable, as 'twas adjudged in *Morris and Eaons Case*, where 'twas pleaded that the Plaintiff did not read the Articles, &c. and that the Ecclesiastical Judge refused this Plea ; But the truth is, a man may prescribe that he and all others whose estate he hath in the Mannor of D. time out of remembrance, have paid to the Parson of C. for the time being, one certain pension yearly for the maintenance of divine-Service there, in contentation of all Tithes , renewing or happening within the said Mannor , and prescribe in respect of the pension paid , &c. to have all the Tithes within, &c. and this was adjudged good in *Banco Regis, Mich. 39 & 40 El. Rotul 199.* And that a lay-person may sue for the Tithes, &c. For at the beginning it shall be intended , that the Lord was seized of the whole Mannor before any Tenancy was derived out of the same : and then by composition or other lawful means, the Lord had all the Tithes within the Mannor, for the said Pension paying to the Parson, and the Law intends it was for divine-Service, *Et pro bono Ecclesie*, the reason of which intendment is the continual usage , time out of remembrance. And upon such special matter, a man might have Tithes as appurtenant to a Mannor; for he prescribes to a *Que estate* in the Mannor, and therefore cannot have them in gross ; but 'twas adjudged in *Winscombs Case* in a Prohibition, that a man cannot prescribe generally in him and all those, &c. to have Tithes appurtenant to a Mannor , without special

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Lib. 2. *The Archb. of Canterburies Case.* 31
matter shewn, because Tithes are due *Jure Divino*.

*The Archbishop of Canterburies Case, 38 of the
Queen, fo. 46.*

A Religious House in M. was given to E. 6. by the statute of 1 E. 6. a Rectory which was appropriated to it, was granted to the Arch-bishop of Canterbury, who leased to the Defendant; and land within M. parcel of the said Colledge came to the Lord Cobham, and from him to the Plaintiff, who shewes, that the Master of the Colledge was seized of the said Land and Rectory, *Simul & semel*, as well at the making of 31 H. 8. as of 1 E. 6. Resolved, that this Colledge came to the King by 1 E. 6. only; for when 31 H. 8. speaks of dissolution, renouncing, relinquishing, forfeiture, giving up (which are inferior means by which, &c.) or by any other means cannot be intended of an Act of Parliament, which is the highest manner of conveyance that can be, and the makers would have placed this in the beginning if they had intended it. Bishops are not included within 13 of the Queen, which begins with Colledges, Deans, and Chapters, &c. Also 1 E. 6. Enacts, That all Colledges by this Parliament shall be in actual possession of the King, which last Act being of as high nature as the first, it cannot come to the King by 31 H. 8. and it was never pleaded, that of Colledges which came by 1 E. 6. the King was seized *vigore* of the statute of 31 H. 8. Resolved, that neither the Act, nor the meaning of 31 H. 8. extends to other Colledges than to those which came to the King by 31 H. 8. For it should be absurd, that a branch of the Act of 31 H. 8. should extend to a future Act, of which the makers of 31 without a spirit of Prophesie could not have foreknowledge; and the Act
of

32 *The Archb. of Canterburies Case. Lib. 2.*

of 31. concludes in as large manner as the late Abbots, &c. which last, as it hath been agreed, extends only to those to be dissolved by 31. Resolved, (admitting that the Colledge had come to the King by 31 H. 8.) that such a general allegation of unity of possession of the Rectory, and the land with it was not sufficient; for no unity shall be sufficient, but lawful and perpetual unity of possession time out of mind, as 'twas judged in *Knightly and Spencers Case*; and that the general allegation of the Plaintiff, that the Master of the Colledge at the making of 1 E. 6. held the land discharged, is not good without shewing how, either by prescription, composition, or other lawful means, as 'tis adjudged in the Bishop of *Winchesters Case*; otherwise if the land had come by 31. then by force of the said branch of discharge, such general allegation had been good. Resolved, that no Ecclesiastical house, except religious, was within the statute of 31 H. 8. Resolved, that though 1 E. 6. saith, that the King shall have the lands of Colledges in *as ample and large manner as the said Priests, &c.* enjoyed the same: yet these general words do not discharge the land of any tithes, for they do not issue out of the land; for a Prior had tithes against his own feoffment of the Mannor, and 'tis no good cause of prohibition, to alledge unity of possession in a Colledge which came to the King by 1 E. 6. as 'tis upon 31 H. 8. in Abbeyes, &c. For the statute of 1 E. 6. hath no such clause of discharge of payment of tythes as 31 hath, and therefore such perpetual unity will not serve upon 1 E. 6. So 'twas likewise resolved betwixt *Green and Buffkin*.

Sir Hugh

Sir Hugh Cholmleys Case, 39 of the Queen, fo. 50.

Tenant in tail, the remainder in tail, the remainder bargains and sells the land, and all his estate to I. S. to have for the life of Tenant in tail, the remainder to the Queen, &c. upon Condition that the estate shall be voyd upon render of 10 l. Tenant in tail suffers a recovery, to the use of himself and his heirs; after the remainder renders the ten pounds, &c. Resolved, the remainder to the Queen was void. 1. Because the Grantee for life of Tenant in tail took nothing, for 'tis a void Grant; for the Grantee shall never have any benefit by it, but such a grant of a reversion were good, for he shall have the services: but a lease for life of I. S. the remainder to I. H. for life of I. S. is good; for this may take effect by forfeiture of Tenant for life; and remainder *dicatur, quasi terra remanens*, which cannot be here, and the remainder must take effect when the particular estate ends, & *vana est illa potentia, que nunquam venit in actum*. And the possibility for tenant in tail to enter in Religion, shall not make the remainder good, because 'tis remote, and it ought to be a common & *propinqua possibilitas*, which shall make the remainder good, as death, coverture, dying without issue; remainder to a Corporation, which is not *in esse*, is void, though such be erected during the particular estate. 2. Because the Law will never adjudge a Grant good by reason of such a forrein possibility, for 'tis *potentia remotissima & vana*, and by indentment *nunquam venit in actum*. 3. Because the remainder being tenant in tail, granted all his estate for the life of Tenant in tail, so that there is no remainder left in the grantor, but in such case the estate tail is in abeyance, *Blithmans Case, 35 of the Queen*, agreed,

greed, tenant in tail covenants to stand seised to the use of himself for life, & after to his eldest son in tail, the remainder to the son is void; for when he had limited the use to himself for his own life, 'twas as much as he could limit by Law. Resolved, (admitting the remainder good to the Queen) that the common recovery hath barred the estate of the first Grantee, and so the condition during his life; for, 'tis out of the statute of 34 H. 8. being not of the gift of the Queen, &c. as *Wisemans* case is before adjudged. A reversioner upon an estate tail, grants upon condition, a recovery bars the reversion, & condition; and as *Capels* Case is before adjudged, if the reversioner, or he in remainder grant a lease, &c. and tenant in tail suffer a recovery, the possession shall never be subject to such charges. Resolved, that the payment to the first Grantee, cannot divest the remainder out of the Queen. 1. Because the condition, during the life of the first Grantee, was discharged. 2. Because, he that takes benefit of a condition, ought to have the intire estate with which he departed, which cannot be here, for the estate of the first Grantee was barred by the recovery. 3. The tender to the first Grantee, was to the intent for to re-vest his estate, which cannot be, because 'twas barred, and therefore the payment cannot divest the remainder out of the Queen.

*Buckleys Case, 40 Eliz. in Communi Banco.
fo. 55.*

TENANT for life, the remainder in fee, tenant for life maketh a lease for four years in *March*; 20 *El.* the Lessee entreth, tenant for life granteth the re-ments aforesaid to C. to hold from the Feast of Saint *John Baptist* next ensuing for life; after the said Feast, the

the tenant for years attorns, the years expire, C. enters, and maketh a lease at will to D. to whom the tenant for life levieth a Fine, he in remainder in fee entreteth and maketh a lease to Buckley, the tenant at will entreteth upon him, and Buckley the Plaintiff bringeth an *Ejectione firme*, and judgement was given for the Plaintiff. In this case divers things were resolved: First, that the grant of C. was void, for the Law maketh construction upon the whole grant, and an estate of Free-hold may not commence *in futuro*. The office of the premises of a Writing (*Viz.*) Feoffment, Lease, &c. is to express the Grantor, the Grantee, and the thing granted. And the Office of the *habendum* is to limit the estate; so that the general implication of the estate, which should pass by the premises is alwayes controlled and qualified by the *habendum*: as a lease or two, *habendum* to the one for life, the remainder to the other for life; here the general implication of Joyntenancy is altered, and the *habendum* is not contrary to the premises, for in the premises no certain estate is passed, and the grant being void at the beginning, the attornment after Midsummer, shall not make the reversion to pass. For, *Quod ab initio non valet, tractu temporis non convalescet*.

Resolved, That when the Grantee entered by colour of this void grant, he was a disseisor, but when the grant is good at commencement, but is to have its perfection by an act subsequent, as Livery, or Attornment, and the Grantee enters before the perfection, &c. he is not a disseisor, but a tenant at will. And if the fine had been levied to the disseisor, come he, &c. he which had the right of the remainder, might enter; for a forfeiture, or a right of particular estate may be forfeited, and entry given to him, who

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hath

hath but a right. Resolved, the Fine being levied to tenant at will, 'tis a forfeiture, and he which hath the right of the remainder may enter, and the tenant for life, and at will, shall be estopped to say, *quod partes Finis nihil habuerunt*, and of such estoppels, which are by matter of Record, and trench to the dis-inheritance of those in reversion, &c. they shall take advantage, though strangers to the Record (for they are privies in estate) A disseisee levieth a Fine to a stranger, the disseisor shall hold the land in this case for ever, for the disseisee against his own fine may not claim the lands, and the Conusee may not enter, for the right which the Conusor had may not be transferred to him, but by the fine the right is extinct, whereof the disseisor may take advantage.

Beckwithes Case, 27 Eliz. fo. 59.

IF the Husband and the Wife levy a fine of lands, whereof they are seised in right of the Wife, and the Husband solely declare the use of the fine, this declaration shall bind the wife, if her dissent do not appear, although her assent to the limitation of the uses do not appear, for it shall be intended (if the contrary do not appear) that she joined with him also in the declaration of the uses of the fine. But if the Husband declare one use and the Wife another use; they are both void: the declaration of the use insues the ownership of the land; for the one (*viz.*) the Wife is not *sui juris*, *sed sub potestate viri*, and hath the estate of the land, and the husband is *sui juris*, and hath not the estate; and if a fine be reversed by nonage of the Wife, all the estate shall be restored to the Wife presently: for all the estate passed from her by the fine, and so it was adjudged *Banc Regis*, in *Worsleys Case*.

Resolved

Resolved, That though the variance of the limitation, be only in one estate, and they agree in all the other, yet all is void. But if two join-tenants, or two having several Estates, vary, 'tis good for every of their parts, and shall be directed by their interests; but if the variance had been in limitation of part of the land, and they had agreed in the use, it should be void, for that part, and good for the residue.

Note, That though the husband might dispose of the land during coverture, yet, for the cause aforesaid his declaration was void

If A. tenant for life, and B. in reversion or remainder, both levy a fine together, generally the use shall be to A. for life; the reversion or remainder to B. in fee, for either of them grants that which lawfully he may grant; and either of them shall have the use which the Law vesteth in them, according to the estate, which they would convey over.

Winningtons Case, 40 of the Queen, fo. 59.

W·Infeoffed B. upon condition, to re-give to the Feoffor for life, the remainders to I. Sonne and Heir of the Feoffor, the Feoffor enters, and takes the profits without agreement, or contradiction of the Feoffee, and leases to D. for 21 years, and yet continues possession: the Feoffee acknowledges a statute to I. the Feoffor makes a feoffment, to the use of himself for life, the remainder to his second Sonne in tail, &c. and dyes: the feoffee enters, and infeoffs the Sonne and Heir; upon which the second Son enters, &c. Resolved, that though the intention was, that the feoffee should make an estate to him for his life, when he hath entered without agreement of the feoffee, 'tis a disseisin; and the rather, because as owner of the land, he took upon him to make a

lease for years. Resolved, that by the lease by Indenture, he hath dispensed with the condition during the term. Resolved, that when the Feoffor disseises the Feoffee upon condition, and the Feoffee acknowledges a statute, &c. This is no disability, to cause the Feoffor to enter, for the right of the Feoffee is not subject to the statute; but when the Feoffee in possession takes a wife, grants a rent, or acknowledges a statute, the land is presently subject, &c. And though upon entry he may be disabled, yet till then he is not, because the wife may die, or the statute be released, and then he may enter, and perform the condition; and the Feoffor by his feoffment hath extinct the Condition, so that the Feoffee may enter, and when he hath infeoffed the eldest Son, he hath done well.

Westcots Case in Communi Banco, 41 Eliz. fo. 60.

IF a man make an estate to three, and to the heirs of one of them; one of them in this Case hath fee simple, and yet the joint-estate continues, for it is all one estate, created at one time, and therefore the fee simple cannot drown the jointure, which taketh effect with creation of the remainder in fee; but when three jointtenants are for life, and after one of them purchase the Fee, or else the Fee descends to him, there the fee-simple doth drown the estate for life, for the estate was in *esse* before.

Note, By this resolution, if tenant for life grant his estate to him in the reversion, and a stranger, 'tis a surrender for the moiety, and the benefit of survivor not regarded; so the doubt in 7 H. 6. well resolved. Resolved, upon view of three presidents, that judgement should be given for the Plaintiff, upon a demise made by husband and wife, without alledging it to be by Deed,

Tookers

Tookers Case, 43 Eliz. fo. 66.

John Arundel seised of lands in fee, maketh a lease thereof to A. and B. for their lives, and after grants the reversion to C. for his life, to which grant A. doth attorn being jointenant with B. and after A. by his Deed doth surrender to C. all his estate, title, and interest, &c. and then dieth; C. entereth, claiming to hold in common with B. and whether his entry was lawful, or no, was the question, and judgement was given that it was lawful; for the attornment of the one tenant for life, shall vest the entire reversion in the Grantee, because the estate of the joint-lessees is intire, and every jointenant is seised *per my, & pro tout*, and by consequence the reversion, which is dependent and expectant upon this estate, is intire also, and the attornment of the one jointenant is the attornment of both. Attornment is a lawful act: if one jointenant assign Dower, 'tis good. Also, the attornment passes no interest from him that attourns but perfects the grant of another. And if one jointenant gives seisure of rent that shall bind the other, but in a *quid juris clamat*, or *quem redditum reddit*, or *per quæ servitias*, one jointenant shall not be permitted to attorn without his companion, for doing of prejudice to his companion. By *Popham*, one jointenant may prejudice another in the personalty, but not in the reality; if one take all the profits, or release a personal action, the other hath no remedy, because of the privity and trust between them, and the folly imputed to him, to join with such a companion.

Note, If a Tenant have notice of the grant by a stranger, and do give his assent thereunto, it is a good attornment, although it be in the absence of the

Grantee, but disagreement ought to be to the party himself, or to attorn for any part, it is good for the whole : for the intent of an attornment is but only an assent to perfect the Grant of another, and he which attorns cannot apportion, divide, or alter the Grant.

Lord Cromwells Case, 40 of the Queen, fo. 70.

BLunt bargained, &c. the Mannor of *A'lexton*, to which the Advowson of A. was appendant by Indenture, to have, as after in the same Indenture is mentioned ; and B. covenanted to suffer a common recovery, to the use of *Andrews* and his heirs, rendering 42 pounds *per annum* to B. and his heirs, with a *nomine pœne*. And further, 'twas covenanted, and agreed, as well for the assurance of the Mannor, to A. as of the rent to B. that B. should levy a fine, &c. to A. and his heirs, and A. by the same fine, should render a rent of 42 pounds *per annum*, &c. *Provided always*, that A. by deed should give the Advowson, &c. to B. during his life ; and if it did not become void, during his life, one turn to his Executors, &c. And further, 'twas covenanted and agreed, that all assurances afterwards to be made, should be to the use of this Indenture, &c. After a recovery was had, and after B. and A. levy a fine to *Perkins*, and he renders a rent of 42 pound to B. and the Mannor with the advowson to A : A. dies without granting the advowson, and B. did not request it ; B. enters for Condition broken, and by Indenture inrolled, bargained, &c. to the Lord *Cromwell*, by which he entered, and upon the re-entry of the sonne and heir of A. brought an Affize.

In this Case is shewed, when this word (*proviso*) or (*provided*) maketh a Condition, and when nor ;
which

which upon long debate was adjudged by all the Justices of *England*.

It was adjudged, that the Law hath not appointed any place in a Deed or Instrument, proper or particular to a Condition, but in what place it pleaseth the parties: and this word (*proviso*, or *provided*) is as apt a word to make an estate Conditional, as *Sub conditione*, or any other word of Condition: but notwithstanding when this word *proviso* maketh an Estate or interest Conditional, three things are to be observed.

First, That the *Proviso* do not depend upon another sentence, nor participate thereof, but stand originally of it self.

Secondly, That the *Proviso* be the word of the Bargainor, Feoffor, Donor, Lessor, &c.

Thirdly, That it be compulsory to enforce the bargainee, feoffee, donee, lessee, &c. to do an Act, and where these concur, it was resolved, that it was a Condition, in what place soever it be placed: for, *Cujus est dare, ejus est disponere*. And although words of Covenant be contained in the same clause of the *Proviso* it self, yet (the *Proviso* being in judgement of Law, a word of Condition) it shall not lose his force; and so it hath been judg'd in *Sympson et Titterel*, 26 E. Serjeant *Bendlowes* demised to *Titterel* certain lands in *Essex*, for forty years, provided alwayes, and it is covenanted and agreed between the said parties, that the lessee, &c. shall not alien: and this was adjudg'd a Condition by force of the *Proviso*, and a Covenant also by force of the other words. Also it was adjudg'd in *Banco Regis*, 36 El. between the Earl of *Pembroke*, Plaintiffs, and Sir *Henry Barkely* Defendant. The Earl granted the office of the Lieutenantship of the West part of the Forrest of *Frenshewood*, in Com. *Somerset*, to Sir *Maurice Barkely*, Father of the said Sir

Sir Henry in Tail, provided alwayes, and the said Sir Maurice Barkely for him, &c. doth Covenant to, and with the said Earl, that neither he the said Earl, nor any of his Heirs Males, &c. shall cut down any Wood growing upon any part of the premises. And it was resolved by all the Justices of England, upon argument before them at Serjeants-Inne, that although the proviso was coupled with the exprefs Covenant of the Grantee, and every condition ought to be created by the words of the Grantor, Donor, Feoffor, &c. yet in judgement of Law, this word (provided) was a condition created by the Grantor, although all the residue of the sentence be the words of the Grantee; for, (proviso) being an apt word of a condition, the same sentence containeth the words of the Grantor, purporting a condition, and the words of the Grantee comprehending a Covenant.

This word (proviso) when it dependeth upon another sentence, or hath reference to another part of the deed, doth not make a condition, but a qualification or limitation of the sentence or part of the deed, to which it is referred. As in a lease without impeachment of waste, provided that he shall not do voluntary waste, grant of the rent-charge, provided that the Grantee shall not charge the Grantor, &c. Resolved, that B. have the rent; notwithstanding that before the *Reddendum*, the use in fee was vested by the recovery in A. And notwithstanding 'twas objected, that the rent ought to be limited out of the Estate of the recoverors: for 27 H. 8. hath an exprefs clause. Where divers be seised, to the intent, that one shall have an annual rent, the same person be adjudged in possession, & disseisin of the same rent, as if a sufficient grant had been made; and so here, the intent being that B. should have the rent, construction

struction shall be made, *ut res magis valeat quam pereat*. Resolved, that the fine levied by B. and A. to P. hath not extinct the condition (and this was the great doubt of the Case) 1. Because by the general Covenant 'tis declared, that all assurances afterwards to be made, should be to the uses and intents in the same Indenture, and to no other; and the Indenture intends that the condition should be saved, as the Lord releases all his right in the land, saving his rent. *Putnams Case*, 4. 5. P. and M. *Dyer*: Feoffment of a Mannor rendring rent, and a re-entry, and a Covenant by an Indenture to levy a fine, which should be to the uses and intents of the first Indenture, and to no other use, which was levied according, with the usual words of release of all his right; yet resolved, that neither the rent, nor the condition was destroyed: and 23 of the *Queen*, *Tuffers Case*, a rent reserved by fine before, was not destroyed by a common recovery, and general entry into warranty: and 34 of the *Queen* in *Clever and Childs Case*, adjudged according to *Putnams Case*; for the same reason 'twas adjudged in this Case, 14 of the *Queen*. for the Advowson of *Allexton*, for *Modus & conventio vincunt legem*, and covenant and agreements of the parties hath power: First, to raise a use. Secondly, to declare uses upon fines, recoveries, &c. Thirdly, for to preserve rents and conditions, and for to direct recoveries, fines, &c. and the Saving may be contained in another deed, delivered at the same time. And these common assurances, as fine, and recoveries are to be construed, according to the intent and common usage, without prying into them with Eagles eyes. Also, here the bargain, &c. recovery, &c. fine, &c. though made at several times: yet, all by mutual agreement, are but one assurance, and tend for to perfect a bargain, &c. and there-

therefore the one shall not destroy the other : Resolved, that except in special Cases, a fine *Surgant & render* cannot be averred by word to another use then is in the fine, feoffment, &c. yet in some Cases, it may be ruled in part by averment by word, when the original contract is by deed ; but a man may by word aver another consideration, which stands with the consideration expressed, but not against it : Read the book at large for this purpose

Resolved, That by the death of A. the Condition was broken ; for when the Feoffee or Grantee is to do an act to the feoffor, &c. upon Condition, and no time is limited regularly, the feoffee may do it at any time during his life. If the Feoffor or Grantor do not hasten the same by request, and upon request and day or time limited, the feoffee or grantee ought to do it accordingly : and if no request be made, and the feoffee or grantee that ought to perform the Condition die, the Condition is broken. Yet, this general rule admits an exception : for, here in case of an Advowson, he hath not time during his life, though no request be made but upon contingency, to wit, if no avoidance fall in the mean time : for if the Grantee stay till the avoydance fall, *Ipsofacto* the Condition is broken ; for B. cannot have all the presentation during his life, which was the effect of the Grant, and the Advowson is come into another plight than 'twas. But where the day is certain for the performance, and the party die before, the Condition is discharged, because the performance is become impossible by the Act of God ; and therefore when a day certain is appointed, 'tis good that the heir of the feoffee be named in the Condition. Another diversity was also agreed ; when 'tis to be performed by a stranger, he ought to request the stranger in convenient time for

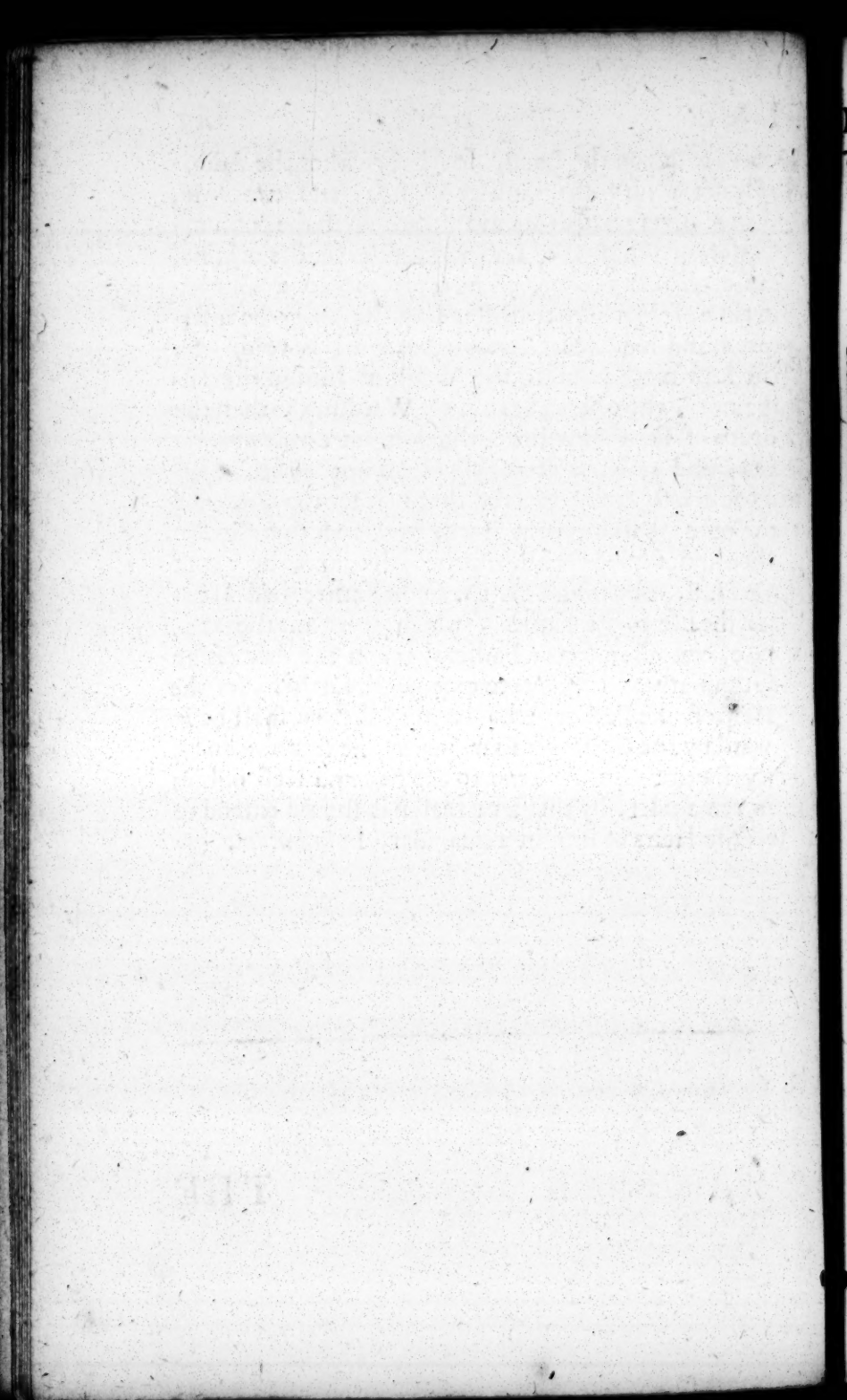
for to limit a time when it shall be done, but if it be to the Feoffor himself, he ought not to perform it before request. Another diversity was taken by some, when the feoffee dies, and when the feoffor dies, for in the one case the Condition is broken, in the other not.

Birghams Case, 43 of the Queen, fol. 61.

R. *Bingham* the Grandfather held the Mannor of B. M. of Sir *Jo. Horfeley*, as of his Mannor of H. and levied a fine to the use of him and his wife for life, and after of R. the Father, his Son and Heir, in tail, and after to the right heirs of the Grandfather; R. the father died, the remainder in tail descended to R. his son within age. Sir I. H. suffered a recovery of the Mannor of H, to the use of himself and his Wife, in tail; and after to Sir R. H. his son and heir in tail; after to the heirs of Sir I. Sir I. and his Wife dyed without issue; Sir R. enters, R. B. the Grandfather dies, by which the reversion in fee descended to R. B. the Wife of *Robert* dies, R. within age enters and leases, &c. Resolved, that the use limited to the right heirs of the Grandfather, upon the fine, is a reversion in the Grandfather, expectant upon the tail, not a remainder; so 'twas resolved in *Fenwick* and *Mitsfords Case*; and so 'twas resolved in the Earl of *Bedfords Case*: Resolved, that Sir R. H. shall not have the ward of the land, for the reversion in fee is holden of him, and not the tail, though both descend from the same Ancestor; for the tail cannot be drowned: and if tenant in tail grant over the reversion, he shall hold the tail of his Grantee, and though the Seigniorie of the tail be suspended, yet the Donee hath two distinct estates, and the reversion is as a Mesne, betwixt the Donee and the Lord,

Lord, and the Lord is not defeated ; for the Law gives no Wardship in such cases, and if it were admitted, that by the unity of Tenure, betwixt the Donee and reversion, 'twas determined, yet nothing shall be holden of the Lord but the reversion, and in some cases, the Donee in tail shall hold of no body, as a gift in tail, the remainder to the King. Resolved, if the Grandfather were Tenant for life, the remainder to the Father in tail, the remainder to the Father in fee, the Father dies, his heir within age, and Sir I. H. grants the Seignory to Sir R. H. and the Grandfather dies, that Sir R. H. shall not have the ward of the Heir, because R. the Father did not hold of him, nor any of his Ancestors, the day of his death, nor the Tail was not within the fee and Seignory of Sir R. or any of his Ancestors at the death of R. the Father ; and the Writ saith, *Præcipe, &c. Eo quod terram illam de eo tenuit, die quo obiit.* And though that during the life of Tenant for life, the Heir of the remainder shall not be in ward, because Tenant for life is Tenant to the Lord, yet the death of Tenant for life is not the cause of ward, but the removing of an impediment, as in *Page and Caries Case*. Tenant for life commits waste, and after Tenant for life in remainder dies, he in remainder in fee shall have waste. 'Twas said, when two accidents are required to the consummation of a thing, and the one happens in the time of one, and the other in the time of another, neither the one nor the other shall have benefit by it ; as the Tenant ceases for a year, the Lord grants his Signiory, and then the Tenant ceases for another year, neither shall have a *Cessavit*, which was agreed. So *Lacies Case*, Trin. 25. of the Queen, who gave a mortal wound upon the Sea, of which the party died upon the Land, yet he was discharged, because the stroak was upon the Sea, the

the death upon the Land, so that neither the Admiral, nor a Jury can inquire of it : and 'twas said, When divers accidents are required to the consummation of a thing, the Law more respects the original cause, than any other. A man presents to a Church in time of War, notwithstanding the party be instituted and inducted, *Tempore pacis* all is void. So the Law more respects the death of him in the remainder, the original cause of Wardship, than the death of Tenant for life, which is but *Causa sine qua non*, and rather a removing of an impediment than a cause ; so 'twas resolved that neither the one, nor the other shall have the ward. Resolved, that Sir R. should not have the third part of the land, by 32 & 34 H. 8. for though R. the Grandfather had limited the use to the Father, which is within the Statute, yet when R. the Father dies, in the life of the Grandfather, the statute extends no farther ; for the Heir of the Father, who is in by descent shall be in ward by the Common Law, not by the statute; and if the statute should extend to the Son and Heir of him in remainder, by the same reason it should extend to all the Heirs of him in remainder, *In infinitum*.





THE THIRD BOOK.

*The Marquess of Winchesters Case,
25 of the Queen, fol. 1.*



Isabel Norris and Anne Mills were seized of the Mannor of *M.* and to the heirs of the body of *L.* a common Recovery is had against *L.* (without naming *Anne*) *H. Norris* being in remainder in tail, is executed for Treason; and 'tis enacted, that he shall forfeit Mannors, &c. uses, possessions, offices, rights, conditions; and all other hereditaments, *L.* dyed without issue, *Anne* dyed, the Queen brought error against the *Marquess of Winchester*, heir of the survivor of the recoverors, the error was, that the original Writ of entry wants, the defendant pleaded, that 14 of the Queen, she gave and restored to the Lord *Norris*, Son and Heir of *H. Norris*, the Mannor *ex Speciali gratia*, &c. and all her right, estate, title, claim, &c. Resolv. That the Record was well removed by the Writ of Error, which was for to remove the recovery of the Mannor of *M.* in *M. cum pertinentiis*, and the Recovery was of the Mannor of *M. cum pertinentiis*. Resolv. That this Writ of Error was not given to the King by any of the words of the statute of 28 *H. 8.* because the terretenant is in by title, and the entry of the person attainted taken away; and such a right, for which the party hath no remedy, but by action, is a thing consists in privity, which cannot Escheat, nor be forfeited by the common law, and this word (*right*) in the act, shall be satisfied with a right of entry; and 'twas observed by the Court, that by a writ of attainder, a right of action was ever given.

E

Note,

Note, a diversity between inheritances, and chattels; for Obligations, Statutes, Recognizance, &c. are forfeited by attainder or outlawry. By the Court if L. had made a Feoffment without warranty, this had been a discontinuance of the moyty, for the joynture was severed. *Resolv.* That H. N. had no right to a moyty of the Mannor; for though the recovery were erroneous (for 'twas agreed, 'twas not void) yet the recovery being in force, the remainder hath no right, for the intended recompence, if tenant in tail suffers an erroneous recovery, and disseise the recoverer and die, his issue shall not be remitted, for the tail is barred, as long as the recovery stands in force; and the Court agreed, that neither an action without a right, with a descen., shall make a Remitter, as in the principal case, nor a right without an action; for a man shall never be remitted, but when an action lies, if the right and possession were in several persons. *Resolv.* For the one moyty, the Recovery shall be a bar to the tail, and remainder; for, though that as well L. as the vouchee might have abated the writ, because Anne was joyntly seised, not named; yet, when the vouchee, without demanding any line, enters generally into warranty, and admits the writ good, and L. recovers in value, which shall inure according to his estate, with the remainder over, 'tis barred; for by the recovery against L. the joynture was severed; but for the other moyty, the recovery was not a bar to the tail, or remainder, because, for that L. was not tenant to the *Præcipe*, but the recovery is by Estoppel only. Agreed, that H. N. at the time of the attainder, was not intitled to have error, yet 'twas agreed, that the remainder upon a tail shall have error upon a judgment given against tenant in tail; for when W. 2. inables the donor for to limit a remainder over upon the tail, all actions which the common law gave to privies

privies in estate, are by the same act, as incident, given also; as a reversion, or a remainder, shall have error upon a judgment given against tenant for life, though not privy by aid, voucher, or receiver. But agreed, that by the common law error doth not lye by, &c. during the life of tenant for life, except he were privy to the first record by aid, voucher, or receiver, for remedy whereof 9R. 2. c. 3 was made, which gives an attainr or error, during life, upon which statute the Court resolved, 1. That though the statute speaks only of reversions, yet remainders are within the purview. 2 That a reversion expectant upon a tail is out, for the statute enumerates these four estates; life, dower, courtesie, and tenant in tail after possibility, which declares their intentions to exclude reversions upon tails, and this upon great reason, for the tail by possibility may continue for ever, and here L. survived H N. and so his possibility of error destroyed, and no word of the act extends to give a possibility. Resolv. Admitting the writ of error had been given to the Queen, that by this general grant of the Q. it did not pass; for a common person cannot grant it, and therefore it ought to pass by prerogative, and ought to have precise words: adjudged in *Cromers Case*, 8 of the Queen; the Queen having a right of disseisee attained, grants *de speciali gratia*, &c. all lands, &c. The right doth not pass without special recital, and words *Owen* and *Morgans Case*, Trin. 27 of the Queen; Baron and Feme are seised, and to the heirs of the body of the husband, a recovery is had against the baron sole, without naming of the wife, and after the wife died. Resolv. That though the wife were not party to the writ, nor the Conisance (for the estate of the husband and wife, was by render upon a fine levied by the husband) and though it does appear within the same record, that she was a stranger, yet the render

to her is voidable only. *Resolv.* That this recovery against the husband only, shall not bind the remainder, for betwixt husband and wife, there are no moities, and the husband hath no power to sever the joyn-ture, or dispose any part; and he, during the life of the wife, is not seised by force of the tail; and he can by no act execute any part; so the *Præcipe* being brought against him only, the recompence cannot enure to the tail, or remainder; for, to all it cannot, for the wife hath a joyn-t estate in possession, and for moiety it cannot, for there are no moities, and the remainder depends upon the entire estate, and recompence recovered by the husband only, cannot enure to him, who hath a remainder depending upon the undivided estate of the husband and wife, and the joyn-tenancy cannot be severed by the judgment against the husband only; and though the husband hath all the inheritance, yet because by no possibility it can be executed, 'tis all one as if the husband had a remainder depending upon an estate for life, and then a common recovery shall not bind, because not tenant to the *Præcipe*, nor seised by force of the tail, but took effect by *Estoppel* only. The issue may say, this ancestor was not tenant *tempore brevis*, and though here the husband survived the wife, this is not material, for the Law adjudges as 'twas then.

Copledikes Case, 44 of the Queen, fol. 5.

C. And his wife were seised, and to the heirs males of the body of the husband, the husband levies a fine to A. B. recovers it in a writ of entry against A. who vouches the husband only (the wife living) who vouches the common vouchee. *Resolv.* That this recovery shall bind the remainder, for here was a lawful tenant to the *Præcipe*; and though the husband were only vouched, and not his wife, who had a joint estate with

with him, yet the husband coming in as vouchee, he came in, in privity of the estate tail, and not of another estate, & the recovery in value gives recompence to the tail, which the husband had, and to the remainder. A tenant in tail, the remainder to B. the remainder to C. the remainder to D. A. makes a Feoffment, the feoffee suffers a recovery, B. is vouched, & he vouches the common vouchee; A. is not bound, but B. and all the remainders are; for though the remainders are discontinued, and cannot be remitted, till the tail be recontinued, yet in a common recovery, which is the common assurance, he which comes in as vouchee, shall be in judgment of law, in privity of the estate, which he ever had, though the precedent estate, upon which the estate of the vouchee depends, be discontinued; so here the husband shall be said in of the tail, and 'tis the stronger because the estate of the wife was put to a right, so that the husband came in as sole tenant in tail, and not joyntly with his wife, because she is not vouchee, and he cannot be in of another estate, because once he had a tail, but, had they had a joynt-estate to them, and the heir of their two bodies, he being only vouched, it might be doubted, whether the tail should be barred, because the wife had a joynt-inheritance with him. 8 of the Queen, *Dyer, Kniveton's Case*. A *Præcipe* is brought against tenant for life, and the remainder in tail, they vouch over, it shall not bind the tail, for the remainder is not tenant to the *Præcipe*, and the land is recovered against the tenant for life only, and recompence shall not go to the remainder, and the remainder was never seised by force of the tail, and so 'twas adjudged in *Leach and Coles Case*, 41 of the Queen.

Heydons Case, 26 of the Queen, fol. 7.

THe Guardians & Canons Regular of the late Colledge of O. seised of the Mannor of O. granted a

Copy-hold to Father and Son for their lives, &c. and after they leased it to H. for 80 years, rendring the ancient rent, and after surrendered their Colledge. Resolv. That the lease to H. was void (the Copy-hold for life continuing) by the statute of 31 H.8 For Copy-hold is an estate for life, and the statute saith '(of which an estate or interest for l.f.; &c.) at the making of such grant had continuance: read the Book at large, where you have admirable rules, for true interpretation of all statutes. Resolv. When a Parliament alters the service, tenure, interest of the land, &c. in prejudice of the Lord, custom, or tenant, the general words shall not extend to Copy-holds; as the statute of W. 2. *de donis conditionalibus*, doth not extend to them; for if the statute should alter the estate, this should also alter the tenure, for the donee ought to hold of the donor, and to do such services (without special reservation) as his donor did to the Lord, and the intent of the act was not to extend to such base estates, which were taken then but tenants at will, and the statute saith, *Voluntas donatoris observetur in carta, &c.* So that which shall be intailed ought to be such an hereditament, which may be given by Charter, and great part of the land within the Realm being granted by Copy, it would be inconvenient, that Copy-holds should be intailed, yet neither fine nor recovery should bar them, so that the owner cannot (without making a forfeiture, by assent of the Lord, and a new grant) dispose of it for payment of debts, advancement of his wife, or younger issues, wherefore the statute does not extend to them by *Minwood Ch. Boron*, which the Court agreed. But it was objected, that the custom and the statute cooperating, might make a tail, as if by a custom, a remainder had been limited over, and enjoyed, and plaints in nature of a *formedon in descender* brought, and

and the land recovered by it; so neither the custoni without the statute, nor the statute without the custom, can make a tail. And *Littl.* saith, that if a custom hath been, that lands, &c. have been granted, &c. or in tail, &c. & paulo post, that a *Formedon en descender* lies of all tenements, which writ was not at common law. *Manwood* answered, if the statute doth not extend to them, without question the custom cannot; for before the statute, all estates of inheritance were fee-simple, and no custom can commence after the statute, for this being made 13 E. 1. is made within time of memory; and *Littleton* is to be intended of a fee-simple conditional, for he knew well that no custom could commence after the statute of W. 2. as appears in his book 2. c. 10. and 34 H. 6. and a *Formedon en descender* in special cases, lay at the common law. And by the Court, another act made at the same time, which gives an *Elegit*, extends not to Copy holds, for the reason aforesaid; but other stat. made at the same time extend to them, as cap. 3. which gives a *Cui in vita & receipte*, and c. 4. which gives to the particular tenant a *Quod ei de forceat*. *Resolv.* That though 'twas not found, that the said rents were the usual rents, accustomed to be reserved within 20 years before, yet, because 'twas found, that the accustomed rent was reserved, and a custom goes to all times before, it shall be so intended, without shewing the contrary: and judgment was entred for the Queen.

The common law is founded upon the perfection of reason, and not according to any private and sudden conceit or opinion.

Downties Case, 26 Eliz. An information in the Exchequer, fol. 9.

THE Duke of N. seised in fee of 3 Messuages in St. S. Parish in H. in the tenure of W. G. bargains & sels his tenements in the Parish of St. A. in H. in the occupation

pation of W. G. and is attainted and executed, Qu. Elizabeth grants them to I. F. if concealed, the Defendant D. claimeth under that Patent, against whom the Attorney informeth, &c. and judgment was given for the Queen.

1. Resolv. Nothing passeth by the bargain and sale, because the first certainty was false; otherwise it is, if the first certainty be true, and the second false; so the Bargainee was a disseisfeere.

2. These lands were not in the Q. by the statute of 33 H. 8. c. 20. without *Scire facias* or seisure, because the words of the statute, That lands shall be in the K. without Office, shall be construed, as if an Office had been found: And lands of a Disseisfeere attainted, shall not be in the K. by Office without *Scire facias*, or seisure; also all possessions, &c. are saved by the said Act, as if it had not been made.

3. That the Q. having but a right, it doth not pass by the grant of the said five Messuages: and after, a special Office was found, and a *Scire facias* brought against the Terretenants, and judgment given, and the Tenements seised into the Q. hands, and she by new Letters granted them to S. and his Heirs, who peaceably enjoyed them,

[Sir William Harberts Case, 36 Eliz. in the Exchequer. in Error, fol. 11.

M: H. acknowledged a Recog. of 3000 l. to the K. and died, a *Scire facias* issued against his Exec. & *heredes terrarum*, &c. The Sheriff returned, that he had no Executors within his Bayliwick; and further, that *Scire fecit. W. H. militi, filio & heredi dicti. M. H. W. H.* maketh default; and judgment is given against him generally, and he bringeth Error, but, upon his Petition to the Queen, he was admitted to compound with her,

1. Resolv.

1. Reso'ved at the common Law (except in special Cases) neither land nor body were liable to execution in debt or damages recovered, but execution was to be done by *Fieri facias*, or *Levari facias* of his goods and chattels, and profits growing upon his land, but in debt brought against one, as heir, his land was liable to execution, because the Plaintiff had no other remedy; for the goods belong to the executors, but the body, goods, and lands of the K. debtor or accomptant were ever liable to execution, but such *Levari facias*, or *Fieri facias*, ought to have been sued within the year, or otherwise he was chased to his writ of debt, and now by *West. 2. c. 45.* he may have a *Scire facias*, and by the 18 Chapter of that statute, an *Elegit* is given of the moiety of the land, which was the first act that subjected land to execution, for Debt or Recognizance, and by the statute of 13 E. 1. *de Mercatoribus* 27 E. 3. c. 9. and 23 H. 8. c. 6. in Statute-Merchant, and Statute-Staple, all the lands of the Conusor at the day of acknowledgment shall be extended into whose hands soever they shall after come. But in all acts *Vi & armis*, where a *Capias* lyeth in Process, there after judgment a *Capias ad satisfaciend.* lyeth, and the K. shall have a *Capias pro fine*, and in such Cases the Law (the preserver of peace) subjecteth the body to imprisonment, and by *Marlebridge, c. 23 West. 2. c. 11.* a *Capias* was given in an accompt, the Process before being a distress infinite, and by 25 E. 3. c. 17. the same Process given in debt, as in account, for before this act the body was not liable to execution for debt as aforesaid.

2. If land of the heir be seised in execution, upon a recognizance of his ancestor, he shall not have contribution against a purchaser of his ancestor, although he come in without consideration, & although the Heir be not charged as Heir, but partly as Terrenant;

tenant ; but one purchasor shall have contribution against another purchasor, and one heir against another heir, because they are in *Aquali jure*, and therefore the writ here which issued against the heirs, without naming the purchasor, is good, although he be charged as Terretenant : The heir shall have an *Audita querela* as well as the Conusor himself before Execution sued, and a *Supersedeas*, but a stranger shall not : If divers acknowledge a recognizance, the charge doth not survive, and the land of one shall not be put in Execution, but all their lands equally : so, if two are bound to warranty, both, or their heirs, and the survivor, and the heir of the other shall be jointly vouched. and the land of both shall be rendred in value. But if Baron and Feme, and the heirs of the Feme are bound to warranty, and the Feme dye, the land of the Baron may be solely taken in Execution, because there are no Moities between Baron and Feme : So that when land shall be charged by any Lien, the charge ought to be equal, but in a Lien personal otherwise it is, as if two are bound in an Obligation, there the charge shall survive : But a purchasor *Bona fide*, before any action brought, shall not be subject to any charge. And three Errors were moved in the record.

1. The *Scire facias* was *heredi terrarum, &c.* which is improper ; for he is not heir to the land, but to his Auncestors

2. The Writ is *Scire facias heredi terrarum, &c.* and the Return is, *Scire fecit W. H. militi heredi predicti M.* and every Return must answer the point of the Writ.

3. The judgment is general against Sir W. H. where it ought to be special, for otherwise his own land shall be liable, where, by the Law, the land only, which came to him by his Father, ought to be charged,

charged, and he is charged as Terretenant, as afore-
said; but these points were resolved by the Court.

Nota, the new Writ of Error, after entry of the first
was not brought, *quod coram vobis residet*, because the
Record is not removed out of the keeping of him
who had the custody thereof before.

Borastons Case, 29 of the Queen, fol. 19.

B. Devised land for eight years, and after to his
Executors, to perform his will, till H. his youngest
Son came to the age of 21 years, and when H. comes
to 21 years, then that he shall have to him and his
heirs, H. dyed at the age of 9 years. Objected, that
till H. attains to 21 years, the land descends to the
heir, and for that he never attained to 21 years, this
remains in the heir, and the intent appears by the
words, that he should not have, till he come to 21
years; and this ought to precede the commencement
of the remainder; and if land were leased till H. comes
to 21 years, (H then being of 9 years) 'tis no abso-
lute lease for 12 years, for if H. dye before 21. the
lease shall be determined, which the Court agreed.
'Twas also said, that when the particular estate, which
should support the remainder, may determine before
the remainder can commence, there the remainder
doth not vest presently, but depends in contingency.

If one make a lease to A. for life, and after the
death of B. the remainder to another in fee; this re-
mainder depends upon contingency, for if A. dye be-
fore B. the remainder is void. A lease is made to A.
for life, the remainder to B. for life; and if B. dye be-
fore A. the remainder to C. for life; this is a good re-
mainder upon contingency. If A. survive B. which case
is all one with the common case, which is many times
agreed on in our books, a lease is made to one for life,
the

the remainder to the right heirs of I. S. this remainder is good upon contingency (*viz.*) if the lessee for life survive I. S. otherwise not; & by the same reason, if a man have issue, a son of 9 years of age, maketh a lease until the son shall accomplish his full age, the remainder to another in fee, as in this case, nothing vesteth in him in remainder presently, *quod fuit concessum per tot. Cur. vid. Chudleyes Case, Lib. 1.*

Ans. That in Wills the intent of the devisor is to be considered; for, when the devisor in his life by apt words, by good advice, might have made his Will sufficient in Law; there, though he makes it in disordered manner, and in barbarous and unapt words, the Law will order those words which want order, according to his intent, as in *Wellock* and *Hamonds Case*, Copy holder in Borough English devises to his eldest Son paying 40 s. within, &c. to every of his other Sons, &c. surrenders according and dyes, the eldest Son did not pay within, &c. the youngest enters, and adjudged lawful; and resolved;

First, That he had a fee; for the recompence and consideration, though it be not to the value, makes a fee in construction of a will. Secondly, that though paying in a will makes a condition, yet here 'tis a limitation; otherwise it would descend upon the eldest Son, who is to take advantage of it, and then it should be at his pleasure for to pay, or not, and therefore it shall be, as if he had devised to the eldest *Quousq;* he fails in payment. So here the devisor hath computed what profits of his land, during the non-age of his son, will suffice for payment of his debts, &c. and that he did not intend that the term of the executors should end by death of H. for so his debts should remain unsatisfied, and his will unperformed, and therefore the Law saith, it shall be construed, that the executors shall have till H. should have come to 21 years of

of age, and therefore the executors have a term for 21 years, which the Court agreed. And though (*when*) and (*then*) are Adverbs of time, yet when they refer to a thing which must of necessity happen, they make no contingency; and 'tis certain, that H. did accomplish, or might have accomplished the age of 21 years; and here, if the term should be ended by death, the remainder should be void; and the Court agreed, that in wills, and grants, the remainder ought to vest in possession, *eo instante* the particular estate ends; but here the term did not end, &c.

Walker's Case, 29 Eliz. in Banco Regis.

Walker leases certain lands to Harries for years, the lessee assigned all his interest to another, Walker brought an action of debt against Harries, for rent arrear after the assignment; and if the action be maintainable, or not, was the question, and upon great deliberation and conference with others, it was adjudged *per Wray* chief Justice, Sir Tho. Gawdy, and Tot. Cur. that the action *did lye*, and was maintainable; in the argument whereof many things were resolved.

If a man lease a stock of Cattel, or other goods, rendring a rent at several daies, he shall not have an action of debt until all the daies be expired.

Likewise, if a man make an obligation or other contract to pay several sums of money at several daies, he shall not have an action of debt, until all the daies be expired, for these are personal contracts, and not real: but in case of a lease for years, which is a real contract, the Lessor shall have an action of debt after every day.

By the Court, debt doth well lye in this case against the Lessee; there are three privities. 1. In respect of the estate only. 2. Of contract only. 3. Of estate and

and contract together. The first between the Grantee of the reversion, or Lord by Escheat, and the Lessee; so betwixt the Lessor and the Assignee of the Lessee: the second betwixt the Lessor and the Lessee (as here) for, notwithstanding the assignment, and the privity of estate removed by the act of the Lessee himself, the privity or contract remains.

First, Because the Lessee himself cannot prevent the Lessor of his remedy; but when the Lessor grants his reversion against his own grant he shall not have remedy, because the rent is incident to the reversion.

Secondly, The Lessee may grant it to a poor man, not able to manure the land, or for malice, will suffer it to lye fresh; so the Lessor shall be without remedy, if debt should not lye against the first Lessee.

Thirdly, There is privity of contract and estate together, as betwixt the Lessor and the Lessee.

If a tenant in Dower, or tenant by curtesie, assign over their estate, yet the privity of the action remaineth between the heir and them, and he shall have an action of waste against them for waste done, after the assignment, but if the heir grant over his reversion, then the privity of the action is destroyed, and the Grantee may not have any action of waste, but only against the assignee; for between them is a privity of estate, and between the Grantee and the Tenant in Dower, &c. is no privity at all.

If a lessor enter for condition broken, or if a lessee surrender to the lessor, yet the lessor may have an action of debt for arrearages due before the condition broken, or the surrender, and this in respect of the contract between the lessor and the lessee 36 of the *Queen, Wagle and Glover* Case adjudged, the lessee assigns his interest, the lessor bargains, &c. the reversion, the bargainee shall not have debt against the lessee, but agreed, that the lessor himself might.

37 *Eliz. in Banco Regis, Int. Overtou and Siddall.*
Two points were resolved. First, if an Executor of a lessee for years, assign over his interest, that an action of debt doth not lye against him for rent due after the assignment. If a lessee for years assign over his interest and dye, the executor shall not be charged for rent due after his death, for by the death of the lessee, the personal privity of the contract (as to the action of debt) in both these cases were determined, 40 of the Queen, *Brome and Hores Case*. A lessee of three acres rendring rent, assigns one to B. the lessor suffers a recovery to the use of C. in fee, who brought debt against the first lessee, adjudged it lyes, for the lessee assigned his interest, but for part, for the privity of Estate remains, because he assigned but part, 41 of the Queen, *Murrow and Turpins Case*, in debt against two Administrators, upon a lease made to their Testator, the Defendants plead, that before the rent arrear, the one of them had assigned all his interest to I. S. of which the Plaintiff had notice, and accepted the rent by the hands of the assignee, due after the assignment, and before that this rent now demanded was due, the Plaintiff demurred, and adjudged against him, because the privity of the contract was determined by the death of the lessee, and therefore after the assignment made by the Administrator, debt doth not lie for rent due after the assignm. Also it was said, that if a lessee assign over his term, the lessor may charge the lessee or his Assignee at his Election. And if the lessor accept the rent of the Assignee, he hath determined his Election, and shall not have an action after against the lessee, for rent due after the assignment, no more than a Lord having received the rent of the Feoffee, shall avow upon the Feoffor afterwards.

Butler

Butler and Bakers Case, 33 and 34 of the Queen, fo. 25.

VV. B. & his wife seised of the Mannor of H. (by an estate made to them during coverture for the joynture of the wife) in tail, holden *in Capite*, and W. seised of land in F. both which amount to a third part of all his lands; and also of the Mannor of T. *in Capite*, which amounts to two parts; W. devises T. to his wife, upon condition that she should take no former joynture, and died the wife in *pays* refused H. the question was, whether the Will were good for the intire Mannor of T. or but for part, by the Stat. of 32 & 34 H. 8. Resolv. That at common Law, if a gift be to a husband and wife in tail, &c. the husband dyes, the wife cannot devest the freehold by any verbal Waiver or disagreement in *pays*; as if she say before entry, that she will never agree to it, she may enter when she pleases; so, if she saith (reciting her estate) that she assents, &c. to the said estate, yet afterwards she may waive it in a Court of record; but if she enters into the land, and takes the profits, though she saith nothing, 'tis a good agreement in Law; for the Law more respects acts without words, than words without acts, & a freehold shall not be so easily devested, to the intent that the tenant to the *Præcipe* should be the better known. But as an act in *Pays* may amount to an agreement, so it may amount to a disagreement, but this is always of one & the same thing, if the tenant by deed infeoff the Lord, and a stranger, & maketh livery to the Lord, if the Lord disagree by word, 'tis worth nothing; and if he enters generally, and takes the profits, 'tis an agreement; but if he distrains for his Seigniorie, 'tis a disagreement, yet in some cases a claim by words shall direct the entry to be an agreement to one estate, and a disagreement to another, &c. See the Book at large, but a man may devest

devested the property of Goods and Chattels, or an obligation sealed to him by disagreement *in pays*.

Resolv. That though the estate was created by way of use, which use, before the statute, might have been waived *in pays*; yet now the statute hath so incorporated the use and possession of the land, that it cannot be waived *in pays*, more than an estate created by feoffment, &c. yet 'twas here resolved, That the refusal *in pays* to have H. and the entry, and agreement to T. was a good agreement to the one, and disagreement to the other. And this by 27 H. 8 c. 10. If any woman ha' b lands, &c. assured after marriage, &c. after the death of the husband, she may refuse her Joyn-ture, and take her Dower, &c. And upon these words the Court agreed, That a woman might refuse her Joyn-ture *in pays*, and be indowed by consent or writ. The great doubt was, if by his refusal of H. by operation of Law, it doth descend immediately to the heir after the death of the Devisor, for to satisfie the statute which saith, *The King shall take for his third part such Mannors, &c. as shall descend, &c. immediately after the death of the Devisor.*

Resolv. First, Upon the reason of the common Law, the refusal shall not have such relation that the devise shall be good for the intire Mannor of T. for a relation is a fiction of Law, to make a nullity of a thing *ab initio*, to one certain intent, which in truth had being, and that *propter necessitatem, ut res magis valeat, quam pereat.* 11 E. 3. The law will make a nullity *ab initio*, that the wife shall have dower, but not as to a colla teral intent, as if the reversion were granted of the lands which the husband and wife held in tail, and the wife for to have dower disagrees, yet the grant is good, for she may be endowed, though the grant stand; and *relatio est fictio juris, & intenta ad unum*: And though relations aid acts in law, as Dow-

er, yet 'twill never aid the acts of the party, to avoid them by relation; as a man infeoffs an infant, or feme covert, and after gives, &c. or devises the land, or any thing out of it, the infant or husband disagrees, this shall have relation betwixt the parties, that the infant or husband shall not be charged in damages, but shall not make the void devise, &c. good. A lease for life, the remainder to the King, the King grants his remainder, the deed is inrolled, it shall have relation to make this pass *ab initio* to the King, not to make the void Patent good. And as relations extend only to the same thing, and the same intent; so also to the same parties, not for to prejudice a stranger: feoffment of a Mannor, and a long time after livery the tenants attourn, this shall have relation to make the services pass *ab initio*, or otherwise they could never pass, nor be parcel of the Mannor, but not for to charge the tenants for the arrearages in the mean time. So here, the refusal shall relate as to the Mannor of H only, not to T. and to the wife only, but not to prejudice the heir (upon whom part of the Mannor of T. descended) to make the devise good for the third part which was void at the time of the death: For, *Omne testamentum morte consummatum est* & as it was at the death, so it shall remain. Resolv. That after the statute of 27 H. 8. and before the statute of 32 H. 8. the Mannor of T. was not devisable, and therefore when the deviser hath not pursued the authority, which the act of 32 and 34 H. 8. gives, 'twas void for part.

The first branch he hath not pursued, which saith, (That all, &c. having a sole estate in fee simple in any Mannors, &c. shall have full and free liberty, &c. to dispose by his last will in writing; as much as of, &c. as shall amount to the clear yearly value of 2 parts in 3 to be divided. For he had not the Mannor of H. for his wife had it joyntly with him. See many excellent Cases

ses in the Book at large, adjudged upon this word (*Having*) in the statutes, the *Initium* of a Will ought to be full and perfect, which is the writing, & therefore if the dev. for command one to write his Will, & he devises white Acre to A and his heirs, and black Acre to B. and his heirs, and dies, before the devise to B is written, yet the devise to A. is good. But if he devises to A &c. upon condition, and he writes the devise, and the testator dies before the writing of the condition, 'tis void; for in the one case the devises are several, and the one is perfect; in the other Case, 'tis maimed and imperfect; for the intire devise was not fully put in writing; so 'twas resolved in the Case at barr, that neither the commencement, nor the end of the Will was full or perfect; for at the time of writing of it, and at the death of the devisor, he had no power in respect of the joynt estate in H. to dispose all the Mannor of T. which amounts to the value of two parts of all. Also, upon the first Branch, he ought to have a sole estate, and here his wife is joyntly seised with him, and she cannot disagree during coverture. The statute gives liberty to him for to devise two parts by Will, but this is to be intended of such land, which he might convey by act executed; but here by reason of the undivided estate of the wife, he cannot dispose it but during coverture. Also the third part of *clear yearly value* is saved to the King, and the intent of the statute was, that the King shall have the equal benefit at least for his third part, as the devisee hath for two parts; but here the devisee had two parts absolutely, & the King but a possibility, *viz.* If the wife would disagree, which is at her pleasure, and this statute hath been construed, that equality should be observed. A man which held three Mannors of three Lords, could not devise two of them, but two parts of every one, upon these words (*Clear yearly value*) 'twas

said that of Inheritances, which are not of any yearly value, some are devisable, some not, as *bona & catalla felonum, fugit. or utlagat.* Fines, amerciaments within such a Mannor or Town, these cannot be devised, nor left to descend, but a *Leet, Waif, or Stray*, or other hereditament appendant, or appurtenant to a Mannor, pass by devise of the Mannor with the appurtenances as incidents, and the statute had no intent for to dismember these things, which by lawful prescription had been united. But if a hundred, with goods of Felons, Outlaws, Fines, Amerciaments, return of Writs, and such other casual hereditaments, within the same hundred, have been accustomably demised for a yearly rent, they may be devised within the purview of the said act. 'Twas said upon the words of the Stat. which saies, that he may devise a rent common, &c. *Out of two parts*, that a devise of a rent of the full value out of all is void, but out of two parts 'tis good. And 'twas observed, that upon 32 H. 8. a devise of all his land had been good for two parts, as adjudged in *unions Case*, for land is severable, but a rent is a thing intire, and 34 H. 8. only gives authority for to devise it.

The second branch which speaks of division, cannot be satisfied; for, during his life, he himself could not (*set it out*) and after his death, it survives to the wife. The third and fourth branch is not satisfied in this word (*immediately*) for till disagreement, without question the Mannor of H. survived to the wife, and if an office had been found before disagreement, without doubt, the Queen should have a third part of the Mannor of T. and the devise being void at the death of the devisor, and the third part lawfully vested in the heir by descent, it cannot be made good and divested by a subsequent disagreement. *Little.* descent to the heir of tenant by the courtesie of a disseissors,

less, doth not take away entry, for the heir comes not in immediately, and 'twas agreed, if a man devises two acres holden by Knights service, and a reversion upon a lease for life descends to the heir; this is no immediate descent within the statute, but the third part of the two ought to descend; see many excellent Cases of devises adjudged upon the statute.

Another good Case of relations, *Jennings and Brags Case*, a disseisee makes an Indenture purporting a lease for years, and delivers it to a stranger, out of the Land, as an Escroul, and commands him for to enter, and deliver this as his deed, to the Lessee, who doth it, and adjudged a good lease, and this diversity agreed.

First, When the person at the first delivery hath not ability to make the contract, and before the second delivery hath, 'tis void as an Infant, and a Feme-covert; otherwise, when at first delivery, the person hath ability, but cannot perfect it, till an impediment removed, which is done before the second delivery, there 'tis good as at Barr:

Resolv. Secondly, That to some intent the second delivery shall have relation to the former, by fiction of Law, *ut res magis valeat quam pereat*, as if a Feme sole deliver a Lease as an Escroul, and after takes husband or dyes; yet by the second delivery 'tis a good deed *ab initio*; and to some intent, *ut res magis valeat, &c.* it shall not relate, yet in truth, the second delivery hath all its force by the first, and is but an execution and consummation of the former, as at Barr; for if it should relate to the first delivery, then it would avoid the lease, for it should be made by one who was out of possession, & *Fictio legis inique operatur alieni damnum vel injuriam*

Thirdly, 'Twas resolved, that as to collateral acts, that there shall be no relation *Omnino*, as if the Obligation

gee release before the second delivery, such release is void.

Ratcliffes Case, 34 of the Queen, fol. 37.

A Feme sole devises Socage land to the son of her daughter in tail, the remainder to two Sisters of the devisee, and to the heirs of their two bodies, by equal portions to be divided, the remainder in fee to the Mother of the daughters, and dies; the son dies without issue; *Muriha* one of the daughters dwelling in her Mothers house (daughter of the devisor) within the age of 16, and above 14, departed at the second hour in the night, with the consent of the husband of her Mother (in whose house she was) eight miles, and there married E. R. The issue was, whether E. R. the Mother, had the custody of the said M. at the time of the contract and marriage aforesaid; for if she had, then the land of M. was lost by the statute of 4 and 5 P. and M. *cap. 8.*

Resolv. That there were two manners of custodies, or Guardianships; the one by the common Law, the other by the statute; at common Law, 4 manner of Guardians, *viz* Guardian in Chivalry, Socage, Nature, by Nurture. The first two are fully described in our Books; but great controversie was at barre, for Guardian by Nature: Some held, that the Father only shall have the custody of his son and heir apparent, within age, not the Mother, Grandfather, &c. Also, that the Father shall not have the custody of his daughter and heir, for it ought to be such an heir, as shall continue sole and apparent heir; as the father shall not have the custody of the youngest son in Borough English, for tenure in Chivalry. Others affirm, that not only the Father, but every ancestor, male or female, shall have the custody of his heir apparent,

parent, male or female. Trespass *quare l. consanguineum & heredem* of the Plaintiff, *cujus maritadium ad ipsum pertinet*, &c. *rapuit*, &c. lyes. The Mother (though she had no land) brought ravishment outward of her son and heir, against the Grandfather, who had land that might descend. By the Court both erre, for 'tis true, that every ancestor shall have trespass or ravishment of ward against a stranger, for his heir, male or female, and the writ shall say, *Cujus maritadium ad ipsum pertinet*; and good reason, for the establishment of his house consists upon providing of a convenient marriage for his heir apparent, & it matters not of what age such heir is, but such action lies not against Guardian in Chivalry, by any of his ancestors but the Father. So the Court resolv'd here, the Mother could not be guardian in Socage, if the land had descended to the daughter; Nor by nurture, because she was above 14, but the common Law gives remedy against a stranger as aforesaid. Resolved here, the Mother shall have the custody within the provision of the Act which hath ordained two new manners of custodies. 1. By reason of nature. 2. By assignation; the first, the Father, after his death the Mother; the second by assignation of the Father, by his will, or any act in his life. See the Book at large for the exposition of this statute.

Resolv. That the assent of the husband was not material, for the statute hath annexed the custody to the person of the Mother, *jure natura*, which is inseparable, and by marriage cannot be transferred to the husband, the Father shall not forfeit the wardship by outlawry, nor shall his Executors have it.

Resolv. Though she departed out of the house six hours before the contract, yet, in judgment of Law, the Mother had the custody at the time of the contract; for, 'tis inseparably annexed to the person of the Mother.

Resolv. That by this devise, the two daughters were tenants in common in tail, by these words (*equally to be divided*) though they never make partition *in fact*, and so it hath been often adjudged.

Resolv. That the husband and wife damsel, had good title upon this verdict against the other daughter; for, by these words (*to the next of kin to whom the inheritance should, &c. come after her decease during the life of such person, who shall so contract, &c.*) it seems the daughter shall not have the forfeiture, for though she be of the blood, yet if M. dye, her issue shall have the land, if without issue, the Mother in the remainder.

To the objection, that the Mother cannot have it, for she is not of the blood of the daughter, but *contra* Father, or Mother are not next, to whom administration shall be granted; and land shall escheat, rather than it shall go to Father, or Mother.

Resolved often against 5 E. 6. that the Father or Mother are next to whom administration may be granted, and *Littleton* says, that the Father is nearer of blood than the Uncle, and therefore the Father shall have a remainder limited to the next of blood of the Son, but he shall not have an inheritance by descent from the Son, for a *Maxim* prohibits it. And 'twas said at barr, if he in reversion had been brother of the half blood, he might have entered, as *proximus de sanguine*, yet none of the half blood could inherit.

See the Book at large, where is excellent learning of descents; as also the learning of *Possessio fratris, &c.*

Resolved by the Court, that it doth not come in question, who shall enter for the forfeiture by the Stat. for the issue was joyned upon a collateral point, whether the Mother had the custody at the time of the contract; and the finding of the Jury is not material, and therefore, though the Plaintiff (who was lessee

of

of the husband of the damsel, as appeared) had good title against the defendant, being lessee of the husband of the other Sister, yet, because the issue was found against him, judgment was given *Quod nihil capiat, &c.*

Boytons Case, 35 Elix. in banco regis, fo. 43.

A Writ of *cap. ad satisfaciend.* is returnable at *Westminster die Lune prox. post. Crast. Animar.* the party is arrested, the Sheriff is not bound to bring the prisoner in *recta Linea*, from the place where he was arrested, or from the County. But if he have the prisoner in Court at the day of the return (being never out of his custody in the mean season) it is good: But if a Sheriff or a Bayliff assent, that one who is in execution, and under their custody, to go out of the Gaol for a time, and then to return, yet although he return at the time, it is an escape. And so it is likewise, if a Sheriff suffer him to go with a Bayliff or a Keeper, for the Sheriff ought to have him *in arcta custodia*, and the statute of *Westminster 2. cap. 11.* says, *Quod carceri mancipentur in ferris.* So as the Sheriff may keep him in Iron and fetters, to the intent that they may sooner satisfy their Creditors. The Sheriff upon a *Habeas corpus* for one in execution may bring the party what way he will, so as he have his body at the day, according to the Writ: If one in execution escape out of the Gaol, and fly into another County, the Sheriff upon fresh sute, taketh him again before any action brought against the Sheriff, the Judges have adjudged this no escape; and if one in execution escape *de sua tort.* and be taken again, he shall never have an *audita querela*, because a man shall not take advantage of his own wrong.

Sir George Brownes Case, 36 of the Queen, fo. 56.

If sue in special tail, the remainder to himself in fee, in the life of his Mother, tenant in special tail
levies

levies a fine (in truth, with *Proclamations*, though they were not found) to Sir G. B. the Mother (living the Son) leased for three lives, which was not warranted by 32 H. 8. upon which Sir G. B. entered.

Resolv. That the lease for three lives, though without warranty, was within 11 H. 7. which saith, (*discontinue, alien, release, or confirm with warranty*) for, the intent of the statute was, to prohibit not only every barr, but every manner of discontinuance which puts the heir to his real action; and because a release or confirmation, is no discontinuance without warranty; the warranty refers to them, to make them equivalent to an estate which passeth by livery, Note, the title of the Act (*Discontinuance of right, or estate*) also in the Act 'tis said, *If no such discontinuance, warrant, nor recovery had been;* so that discontinuance stands in equal degree with warranty. in

Resolv. That if the issue had granted his remainder in fee only, and not barred his tail, he might have entered by the words of the Act, for the forfeiture, which saith, *Every person to whom the interest, &c. title or inheritance, after the decease of the woman should appertain, may enter and enjoy, &c.* as if no such discontinuance had been made; and if no such had been, the land should descend to the issue.

Resolv. That in this case, Sir G. B. shall enter, for if no discontinuance had been, he should enjoy it against Anthony the issue, and all the heirs of his body, though the fine be levied in the life of the ancestor, for 32 H. 8. sayes, *In any wife intailed to the person so levying the fine, or to any of his ancestors;* and though it work, part by conveyance, part by conclusion, yet the tail being extinct by the fine, Sir G. B. in remainder shall enter. The same Law in this case, though the fine were without *Proclamations*, for the issue against his fine cannot enter; but the entry of the conusee is lawful.

Anderson

Anderson said, where 'twas inverted (to make an evasion out of this Act) that a woman should accept a fine *come coo*, &c. and render for a thousand years, pretending this not within the words (*discontinue, alien, release with warranty*, &c. that this was an alienation within the intent of the Act or otherwise the statute should serve for nothing, and so it hath been resolved.

Rigemaies Case, 36 *El. in ban'o regis*, fo. 52.

IT was resolved *per tot. cur* although the prisoner in execution escape out of view; yet if fresh sute be made, and he be taken again in *recenti insecutione*, he shall be in execution, otherwise at the turning of a corner, or by entering into a house, or other means, the prisoner may be out of view; and although he fly into another Country, yet because the escape was of his own wrong, whereof he may not take advantage, the Sheriff upon fresh sute may take him there, and he shall be in execution. But if the Plaintiff bring his action against the Sheriff upon the escape, before that the Sheriff take him; or if the Sheriff do not make fresh sute, yet in both these cases the Sheriff may take him, and keep him in his custody, until he make agreement with him, or he may have an action of the case for his wrongful escape. And although the defendant be taken upon a *cap. ad satisfaciendum*, and escape, yet if the Writ be not returned and filed, the Plaintiff may have a new *cap. ad satisfaciendum* against him, and take him again, and he shall not take advantage of his own wrong. But if the Plaintiff will, he may charge the Sheriff with the escape, if he did not take him again in fresh sute before the action brought; and when the prisoner escapes of his own wrong, and be taken again, he shall never have an *audita querela* against the Sheriff. But it is otherwise
if

if he escape with the consent of the Gaoler, then he may not take him again; and if he do, then he may have an *audita querela*.

Resolved, that the barr was insufficient, for the Plaintiff counted of an escape in *London*, and the defendant justifies the retaking in *Devonshire*, so that the escape at *London* was not answered; but the Plaintiff not denying the fresh sure, but by Protestation relying upon this, that he was out of view, 'twas adjudged against him, but if he had demurred upon the barr, he should have had judgment.

Resolved, that after Demurrer, there shall not be a Repleader, for the parties by mutual consent have put themselves upon the judgment of the Court, and therefore without their consent, they cannot replead, and so several times adjudged.

Lincoln Colledge Case, 37 & 38 of the Queen, fo. 59.

Husband seised to him, and to his wife for life, and to the heirs of the body of the husband, dyed, the issue, in the life of the wife, then tenant of the free-hold (for so the pleading was) which shall be intended by disseisin, for no surrender or forfeiture was alledged, 4 H. 8. suffered a recovery, with single voucher by agreement, that the recoverors should infeoff L. &c. to divers uses, and that the wife should release to them with warranty, which was done according 11 H. 8. The wife dyed, after the issue dyed; after his issue in the third degree entered; the question was, whether the collateral warranty should bind; the recovery did not come in question, for by the pleading it shall be intended, that he was seised by other title, than by the tail, so the single voucher not material.

Resolved, that though the first branch of the Statute

rule of 11 H. 7. says, that the warranty shall be void, yet the clause following (*& that it shall be lawful, &c. to enter*) being annexed to the first, expounds the generality of it; and though he to whom the interest, &c. after the death of the wife appertains, may avoid it by entry, yet 'tis in force against all others; and so the Judges have expounded other statutes, 8 H. 6. All Outlawries shall be void, except a *Capias* be awarded against the party, in the County, where, &c. yet this ought to be avoided by error. The statute of 1 of the Queen ordains that all grants, &c. by a Bishop, in other manner than, &c. shall be utterly void, but 32 and 33 of the Queen, betwixt *Salé* and the Bishop of C. and L. a grant of a next avoidance of a Church (not warranted, &c.) was not voidable against the Bishop himself, but only against his successors. And with this resolution agrees 27 H. 8. upon the same statute of 11 H. 7.

Resolved, that this warranty was out of the intent of the Act, which only restrains warranty which prejudices the heir in tail, or those in remainder, but when the warranty, &c. of the wife, is but for to perfect and corroborate the estate assured by the issue himself, &c. 'tis not restrained by the Act, for it shall be intended to the benefit of the heir, which is the reason that a common recovery is not restrained, by W. 2, for the intended recompence; and if the wife and the issue had joyned in a fine, this had barred the tail, so, if the wife had surrendered, the issue might have suffered a recovery. H. 39 of the Queen, the case was, that the younger Son tenant in tail by devise, was vouched in a recovery suffered by a woman tenant for life, by the same devise, and this was to the use of the vouchee, and his heirs, who dyed; and 'twas adjudged, that the Sister of the vouchee by the intire blood shall have it, not the elder brother,

brother, and that the recovery was not within 24 of the Queen, though suffered by tenant for life; and the statute says, that it shall be utterly void, for 't was not the intent, that the Act should extend to a recovery, in which he in remainder in tail was vouched, who had an estate that might continue for ever, and had the power to dock all the remainders: so here, this statute doth not extend to this warranty, because, &c.

Resolv. When the first issue disables himself, for to take advantage of the forfeiture, and die; his issue shall never take benefit of it, because he was not *in rerum natura*, nor had the immediate interest at the time; and this was Sir George Browes Case before, where the issue in tail in the life of his Mother, tenant in special tail, levied a fine without proclamations; and here if error were in the recovery, the warranty bars him of his action, because he himself by his own act, hath barrd his entry. But here, if the wife had released, &c. after the death of the issue, his issue might have avoided the warranty.

Note, (Reader) it seems to me, if in such case a woman levies a fine, or suffers a recovery, though the daughter enters or not, and though she joyns in the fine, or is vouched in the recovery, or by any other act disables her self, yet the Son born after shall take advantage of it; for entry upon the Act of 11 H. 7 is not like entry upon the statute of 6 R. 2. cap 6. For there the daughter by expresse words hath it as a perquisite, but upon 11 H. 7. *per formam doni*.

Resolv. If tenant in tail, in of another estate, suffer a common recovery, and a collateral ancestor releases with warranty to the recoveror after the recoveror makes a Feoffment to uses, which are executed by the statute of 27 H. 8. and the ancestor dyes, though the estate be transferred in the *post*, before the descent

descent of the warranty yet it shall bind, and the re-re-tenant shall rebutt. See excellent learning upon this point, where an estate transferred in the *post*, before descent of the warranty, shall bind, where not, & where there shall be Rebutter in such case, where not.

Pennants Case, 38 of the Queen, fo. 64.

LEase for years upon condition that the lessee shall not assign, &c. without assent of the lessor, he assigns, &c. the lessor, not having notice of the assignment, accepts the rent due after, and enters; it was adjudged for the lessor his entry lawful; for that the condition being collateral, the breach whereof may be so secretly contrived, that it is not possible for the lessor to have notice thereof, and notice in this case is material, and issuable; for otherwise the lessee might take advantage of his own fraud. But if a man make a lease for years, rendering rent upon condition, if the rent be not paid to re-enter, in this case if the lessor demand the rent, and the same is not paid, if after he accept the rent (before the re-entry made) due at another day, he hath dispensed with the condition, for there the condition is annexed to the rent, and he (having made demand of the rent) well knew the condition was broken; but although in this case, that he accept the rent due at the day, for which he made the demand, yet he may re-enter, for as well before, as after his re-entry, he may have an action of debt, for the rent upon the contract between the lessor and the lessee.

If the lessor distrain for the rent for which the demand was made, he hath affirmed the lease; for after the determination of the lease, he may not distrain for rent.

It was also resolved, that as well in case of the condition

dition annexed to the rent, as in case of a condition annexed to any collateral act, if the conclusion of the condition be, that then the lease for years shall be void, there no acceptance of the rent due at any day after the breach of the condition will make the void Lease good.

Resolved, that as a voidable Lease cannot be affirmed by word, for money, &c. so the acceptance of a rent which is not *in esse*, nor due to him which accepts it, doth not affirm the Lease as a gift to a husband and wife, and to the heirs of the body of the husband, the husband dyes, the issue accepts the rent of the Lessee of the husband during the life of the wife, the wife dyes, yet the issue shall avoid the Lease, for no rent was due.

And there is a diversity between a Lease for life, and for years, in case of a Lease for life, though the conclusion of the condition be, that it shall be void, yet acceptance of a rent due before the breach, shall affirm it, for the free-hold being created by livery, cannot be determined before entry. If the successor accept the rent upon a Lease for years of a Parson, Vicar, Prebend, 'tis worth nothing, for 'tis void by death, otherwise of a Lease for life. But if the successor of a Bishop, Abbot, or Prior, accept the rent upon a Lease for years, he shall never avoid it, for 'twas voidable only.

Note (Reader) it seems to me, if upon a Lease for life, the Lessor accepts the same rent which was demanded, he hath affirmed the lease, for he cannot accept it as due upon any contract, as upon a lease for years; for when he accepts it, he cannot have an action of debt for it, but his remedy was by assize, if he had seisin, or by distress, but after re-entry he may have an action of Debt.

If he that hath a rent-service, or rent-charge, accepts

cepts the rent due at the last day, and therefore makes an acquittance, all the arrerages due before, are thereby discharged, and so it hath been adjudged, in *Hopkins and Mortons Case*, 10. El. Dyer.

A man is not bound to pay an annuity without an Acquittance, but a rent service, or rent charge he is.

If the Lord accepts the rent or service of the Feoffee, he loses the arrerages in the time of the Feoffor, though he makes no acquittance; for, after such acceptance, he shall not avow upon the Feoffor at all; nor upon the Feoffee, but for the arrerages which incurred in his time; otherwise, where the Feoffor dies, and there is such an acceptance. But acceptance of rent or service by the hands of the Feoffee, shall not bar the Lord of relief due after, for that is no service, if it were, debt would not lye for it.

'Twas said, if the Lord accepts services by the hands of the heir, infeoffed within age by collusion, he loses the wardship. But against this 'twas objected: First, because the Lord upon tender of the arrerages, and notice, is compellable to avow upon him. Secondly, he cannot be concluded before title accrued. Answered: The Lord is not compellable, &c. for he may shew the collusion, and avow upon the Feoffor, and by acceptance, the Lord waives the benefit of the statute, purges the collusion, and loses the wardship.

Westbyes Case, 40 Elix. in Banco Regis, fol. 71.

Westby brought an action of debt against *Skinner & Catcher*, Sheriffs of London, for an escape. One *Buston* was in execution, and in their custody, at the sure of one *Dighton*, and at the Plaintiffs sure, and at the end of their year, the Sheriffs delivered the body of *Buston* (amongst others) unto the new Sheriffs by Indenture, wherein the execution at the sure of *Dighton*, was mentioned, but the execution at
G
the

the sure of *Wiffby* was omitted, and *Buston* still continued in the Gaol, and if the Defendants should be charged in this Case with the escape, was the Question? And it was adjudged that they should be charged, for although he was within the Walls of the Prison, yet that was an escape in Law, as to the Plaintiff. And it was resolved, that *Ex instanti*, that the ancient Sheriffs delivered their Prisoners to the new Sheriff, the escape began as to the Plaintiff.

Note hereby, that the Law judgeth one that remains in the Gaol to have escaped; and it was resolved, that the ancient Sheriffs ought to give notice to the new Sheriffs of all executions that they have against any, that are in their custody; and it was also resolved, until the Prisoners be delivered to the new Sheriffs, they remain in the custody of the old Sheriff. Notwithstanding the new Letters Patents, the Writ of discharge, and the writ of delivery. And it was resolved, that if the old Sheriff die before a new one be made, the new Sheriff at his own peril ought to take notice of all executions against any of the Prisoners; and this is for necessity: and if one in Execution break the Gaol between the death of the old Sheriff, and the making of the new, this is no escape, but when the Sheriff is dead, all the prisoners are in the custody of the Law, untill the new Sheriff be made; and although no fresh sure be made after, they may be taken in possession, in what place soever they come in.

Dean and Chapter of Norwich Case, 40 and 41 of the Queen, fol. 73.

H 8. An. 30. translated the Priory and Covent of the Cathedral Church of the holy trinity of Norwich into the Dean and Chapter, &c. and discharged them by their special names, *I am de habit. quam de reg. la. in fofq; decanum & Capitulum, perpetuis temporibus dura*

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turis corporavit, & granted them all the Mannors, &c. which of late belonged to the Priory; & granted that they should be the Dean and Chapter of the Bishop of *Norwich*; and his Successors: after 2 E. 6. the Dean and Chapter surrendered to the King their Church, and possessions, and he incorporated them by the name of the Dean and Chapter, *Sanctæ & individue Trinitatis Norwⁱ ex fundatione*, E. 6. And regranted them their Church and possessions, by the name of the Dean, &c. omitting *ex fundatione Regis*. E. 6.

Objected, that *Herbert* heretofore Bishop of *Norwich* was founder, and being not party to the translation, 'tis voyd.

Answered, the King was founder, as appears by many Records, and by the foundation; but, admit the Bishop founder, yet the translation was good, for the Pope might have discharged a Monk of his profession, and therefore the King may do it, by the statute of 25 H. 8. And this translation is no prejudice to the founder, for he remains founder, and nothing is altered but the rule and profession; and this Prior was eligible. 11 of the Queen *Dyer Corbets Case*, proves this very translation good, & by judgment of Parliament, 33 H. 8. such translations are good. All Chapters were Monks, & notwithstanding, their translations into Prebends, or Canons, the Advowson remains as before. But admit the translation void, yet, 'tis good by the statute of 35 of the Queen, see the Book at large.

Objected, when they surrendered to E. 6. and he regranted to them, by the mis-naming of the Corporation, for (*ex fundatione Regis* E. 6.) was omitted, the grant was void, and nothing passed, for the name of the founder is parcel of the Corporation.

Answered, notwithstanding the surrender of their Church, their Corporation continues; and they remain the Chapter of the Bishop; though there can-

not be a Gardian of Chapel, when the Chapel and all the possessions are aliened. In Christian policy 'twas thought necessary, (for that the Church could not be without Sects and Heresies) that every Bishop should be assisted with a Counsel, viz, a Dean and Chapter.

1. To consult with them in deciding of difficult controversies of Religion, to which purpose every Bishop *habet Cathedram*. 2. To consent to every grant the Bishop shall make to bind his successors; for the Law did not judge it reasonable, to repose such confidence in him alone: at first all the possessions were to the Bishop, after a certain portion was assign'd to the Chapter, therefore the Chapter was before, they had any possessions, and of common right, the Bishop is Patron of all the Prebends, because their possessions were derived from him, so that so long as the Bishoprick continues, the Dean and Chapter (being his counsel) remains, though they have no possessions, as at first they were when the Bishoprick consisted all of spirituality. The Prior & Friars Carmelites had not any possessions, nor place. And 32 H 8 Fitz held, if an Abbot or Prior and convent, sell their possessions, yet their corporation remains. All Bishopricks were at the foundation of the Kings of England, and ancient Donative by them; but, by grant of the Kings, became after Eligible by their Chapter; wherefore, if by their surrender, their Corporation should be dissolved, three inconveniences would follow: First, to the Bishop, for his assistance in the Episcopal function. Secondly, to the Bishop and others, touching the confirmation of grants. Thirdly, to all the Church, for how should the Bishop be chosen?

Resolved. First, if there were any imperfection in the Translation, the Statute of 35 of the Queen hath made it good.

Secondly, that the act of 1 E. 6. hath made it good, though the Corporation were gone by the surrender, and the misnamer material. Hold-

Holden by the Justices and Lord Keeper, that the ancient Corporation remains, notwithstanding the surrender.

Fermors Case, 44 of the Queen, fol. 77.

Smith Lessee for years of a House, and tenant at will of Land, and Tenant by Copy of other land within the manor of S. to Fermor, leased all for life to I. S. and also seised of other land there in fee, levied a fine with Proclamations of all messuages, and lands (which comprehend all those Leases, and also his inheritance) by covin, to disinherit his lessor, and after the fine, alwaies continues in possession and pays the several rents to F. The Lessee for life dye, the years expire, S. claims the inheritance.

Resolved, that the Lord of the Mannor was not barred by the said fine. 1. The makers of the statute of 4 H. 7. never intended that a fine levied by Tenant at will, years or Copy, which pretend no inheritance nor title to it, but intend the disherison of the Lord, &c. should bar them of their inheritance, and where the Stat. saith (*That fines ought to be of greatest strength to avoid strife and debate.*) this feoffment and fine by the Lessee shall be the cause of strife where none was before 2. The statute doth not intend, that those who of themselves without such fraud, could not levy a fine to barr those which had the freehold and inheritance, should be inabled to levy a fine by making of an estate to another, by practice and fraud. 3. If doubt be conceived upon an act of Parliament, 'tis to be construed by the reason of the Common-law, and that so abhors fraud, & covin, that all acts as well judicial, as others, and which of themselves are lawful and just, yet being mixt with fraud and deceit, are tortious and illegal. If a woman intiruled to have dower (which is favoured in Law) by covin causes a stranger to disseise the

terretenant, to the intent to bring dower against him, and recovered accordingly, 'tis all void. So if a Feme covert, or Infant (much favoured in Law) of covin causes another to disseise the discontinuee, and infeoff them, they are not remitted. Sale in market overt shall not bind, if the Vendee had notice that the property was to another, or if the Sale be by Covin; the law hath ordained the common Bench as a Market overt, for assurance of Land by fine: for it saith, *Finis finem litibus imponit*, yet covin shall avoid them; A Vacat was made in Banco of a recovery had by covin, 33. & 34 of the Queen adjudged, where Tenant for life levied a fine with Proclamations, and five years passed, and he died, that the Lessor shall have five years after his death, for though the statute saves the right which first shall grow, and the right first accrued to the lessor by the forfeiture, yet because the lessor by covin of the lessee, might be barred, for he expecteth not to enter, till after the death of the Lessee, 'tis no barr, and namely, when the lessee hath land of inheritance in the same Town, (as in this Case) so 'twas agreed in the same Case, if the feoffee of the lessee for life hath lands in the same Town, & levies a fine, &c. the lessor shall have five years after the death of the lessee, for he knew not of what land the fine was levied (not being party to the Indenture or agreement) &c. So, the Judges have construed the act against the Letter, for salvation of the Inheritance of him in reversion. And 'twas said, if the feoffee of a lessee for years, who made a feoffment by practice, hath land in the same Ville, and levy a fine, and the lessee payes the rent to the lessor, it shall not bind, and in the principal Case, the payment of the rent after the fine, makes the fraud apparent, for by this the lessor was secure, and not cause of any doubt of fraud.

But 'twas resolved, if the bargaine or feoffee of A. perceiving

perceiving that C. hath right, levies a fine, or takes fine of a stranger, to the intent, to barr C. this fine levied by consent shall bind, for nothing was done in this, that was not lawful, and the intent of the Act was to avoid strife. So, if A. (pretending title) disseise B. and to the intent to barr the disseisee, levies a fine, for the disseisor, *Venit tanquam in arena*, and 'tis not possible but the disseisee had knowledge of it, & if he doth not enter, 'tis his folly. But in the Case at barr, every one will presume that the fine is levied of his own land, because that he might lawfully do; and though this contains more acres, than his own land, this is usual almost in all fines; and the covin of the lessee is the cause of non-claim of the lessor, and a man shall not take advantage of his own covin; and here the fraud is the more odious, because of the great trust, *viz.* Fealty. To the objection, that it should be mischievous to avoid fines, upon such nude averments, 'twas answered, That it should be a greater mischief, principally, if fines levied by such covin should bind. And an averment of fraud may be taken by the statute of 27 of the Queen, against a fine levied to secret uses, by fraud, for to deceive purchasers. So by the statute of 13 of the Queen, an averment may be taken against a fine levied upon an usurious contract.

Twynes Case, 44 Eliz. in Cam. Stel. fol. 18.

IN an Information per *Coke* Attorney general against *Twyne* of *Hampshire*, for contriving & publishing of a fraudulent deed made of goods. The case upon the statute 13 *El.c. 5.* was thus: *Pierce* was indebted unto *Twyne*, in 400 l. and to one C. in 200 l. C. brought an action of debt against *Pierce* and (hanging the writ) *Pierce* being possessed of goods and chattels to the value of 300 l. in secret made a deed of all his goods & chattels to *Twyne*, in satisfaction of his Debt, and yet

Pierce continued in possession of the same, and some of them he sold, and his Sheep he marked with his own mark, and after C. had judgement, and a *Fier. fac.* to the Sheriff, & by vertue thereof Bayliffs came to make execution of the goods, & divers persons by the commandement of Twyne, with force resisted them, claiming them to be the goods of Twyne by vertue of the same deed, & whether this deed was fraudulent or no, was the Question; & 'twas resolved by Sir Thomas Egerton Keeper of the great Seal of England, and by the chief Justices, Popham and Anderson, and all the Court of Star-chamber, that this deed was fraudulent, and within the statute of 13 *El.* And in this case divers things were resolved.

First, That this Deed had the marks of fraud, it was general, and without exception of his apparel, or any thing of necessity: for *dolus us versatur in generalibus.*

Secondly, the Donor continueth in the possession.

Thirdly, It was made in secret, *Et dona clandestina semper sunt suspiciosa.*

Fourthly, It was made, hanging the Writ.

Fifthly, There was trust between the parties; for the Donor was in possession, and used them, and fraud is alwaies apparelled with trust, and trust is the cover of fraud.

Sixthly, It was contained in the deed that it was honestly, truly & *bona fide.* *Et clausula inconsuetæ semper indicant suspicionem;* & it was resolved, although it was a due debt to Twyne, and a good consideration of the deed, yet it was not within the proviso of the said Act of 13 *Eliz.* By which it was provided that the said Act doth not extend to any estate or interest in lands, &c. goods & chattels made upon good consideration, and *bona fide*, for although it be upon good and true consideration, yet it is not *bona fide*, for no deed shal be deemed to be made *bona fide* within the said proviso that

accompanied with any trust; for the Proviso saith, Upon good consideration, & *Bona fide*, so as good consideration doth not serve, if it be not also *Bona fide*.

Therefore (good Reader) if any Deed be made to thee in satisfaction of any debt, by one that is indebted unto others also; First, let it be in publick manner before Neighbours. Secondly, valued by good men to a true value. Thirdly, take them out of the possession of the Donor presently; for continuance of possession in the Donor is a mark of trust.

There are two considerations; *viz* Consideration of blood or nature, and valuable considerations; And if one that is indebted to five several persons, every one 20 l. in consideration of natural affection, doth give all his goods unto his Son or Cosen. The intention of the Statute was, that the consideration in this case should be valuable, for equity requires that this deed that defeats others, shall be made of as high a consideration, as the things are, that are so defeated thereby: for it is to be presumed, that the Father, if he had not been indebted unto others, would not dispossess himself of all his goods, and subject himself to his Cradle. And therefore it shall be intended that it was to defeat his Creditors. And if a consideration of nature or blood, should be a good consideration within this Proviso, the Statute would serve for little or nothing, and no Creditor would be sure of his Debt.

A feoffment made solely in consideration of nature or blood, shall not take away the Use raised upon valuable consideration, but it shall take away a use raised in consideration of nature, for both considerations are in *equali jure*, and of the same nature.

Many men marvel the reason that so many Acts and Statutes are daily made: this verse answereth.

Queritur ut crescant tot magna volumina legis:

In promptu causa est, crescit in orbe dolus.

And

And because fraud abounds in these dayes, more then in former times, it was resolved, that all statutes made against fraud, shall be liberally expounded, for to suppress the fraud, and according to this, see several resolutions in the Book at large.

It was resolved, that no purchaser may avoid a precedent conveyance made by fraud, but he that is a purchaser for money or other valuable consideration paid, for consideration of blood is a good consideration, but not such a consideration as is intended by the statute 27 *El. c. 4.* for valuable consideration is only good consideration by the same Act. *Anderson* chief Justice of the common banck said, That a man who is of small capacity, and not able to govern his lands that descends unto him, and being disposed to riot and disorder, by the mediation of his friends, by open act conveyes his land to them, upon trust and confidence, that he shall take the profits for his maintenance, that he shall have no power to waste or consume them; And after, he being seduced by deceitful and covetous persons bargained for small sums, his lands of great value; this bargain, although it were for money, was holden to be out of the statute, for this Act was made against all fraud and deceit, & shall not aid any purchaser that cometh not to the lands of good considerations lawfully without fraud or deceit. And in this case *Twynne* was convicted of fraud, and he, and all the other of riot.

Resolutions. P. 44 of the Queen upon the Statutes of Fines, fol. 84.

A Tenant for life, the remainder to B. in tail, the remainder to B. and his heirs, B. levies a Fine, hath issue and dies, before all the Proclamations passed, the issue then beyond the Sea, the Proclamations are made, the issue returns, and upon the land claims the remainder.

Re-

Resolved, that the estate which passed, was not determined by the death of tenant in tail; so, if Tenant in tail of a Rent, Advowson, Tythes, Common, &c. grants by deed, and dies; for if the issue brings a *Formedon* for the rent, he makes the grant voydable, if he distreyns, or claims it upon the land, he by this determines his election. And there is no diversity, betwixt tenant in tail of a rent, &c. and tenant in tail of a reversion, or remainder upon an estate for life, though in the first Case, the issue may have a *Formedon* presently after the death of tenant in tail.

Holden by *Popham*, and divers other Justices, that the statute of 32 H. 8. hath enforced the Case, that the estate which passes by the fine of tenant in tail, shall not be determined by his death, for by this 'tis provided that fines levied of any land &c. intailed, immediately after the fine ingrossed, and Proclamations made, shall be a barr, if the fine cannot be a barr without continuance, the statute hath provided, that the Estate shall continue, for it provides for all necessary incidents to the perfection, and consummation of it. Every fine shall be intended with Proclamations, for 'tis most beneficial for the conusee, & all fines being the general issue of land are levied according.

Resolved, that though by the death of tenant in tail a right to the estate tail descends to the issue, for that the tenant in tail dyed before all the Proclamations passed, yet, when they are passed without claim, this right is barred by the statute of 32 H. 8.

Resolved, by all the Judges and Barons (but three) that the issue (in this case) being heir and privy, cannot, by any claim, save the right of the tail, which is descended to him, but that after the proclamation, he shall be barred; for, 'tis provided (that every fine after the engrossing of it, and Proclamation had and made, shall be a final end, & concludes as well privies as strangers.)

gers.) And if no Saving had been, all strangers had been barred also, and all the exceptions extend only to strangers; but the issue is privy.

To the objection; if by the equity of the Statutes, the issue cannot claim, &c. to what purpose are the Proclamations with such solemnities?

Answered: 32 H. 8. being an Act of explanation of 4 H. 7. as to the fine by Tenant in tail, shall not be taken by any strained construction against the letter; for then 'tis requisite to have a new act of explanation, upon the explanation, & *sic in infinitum*. By 4 H. 2. every one hath liberty to pursue a fine according to the said Act, *viz.* with Proclamation, &c. or without (as at Common Law) and therefore the Act of 32 H. 8. of necessity prescribes that Proclamations shall be made according to 4 H. 7. to distinguish it from a fine at Common Law, and not to inable the issue for to make claim, for this should be against the express intent of the Act, in the Preamble, and Purview. Also it should be very inconvenient, if, when such fine is levied, for a valuable consideration, advancement of his issues, or payments of his debts, and he dies before Proclamations, that all should be avoided by the claim of the heir, when the consuee could not have better assurance, by recovery, for that he was not tenant to the *Præcipe*. See the Book at large, in what case the issue in tail may averr seisin in a stranger, & *quod partes Finis nihil habuerunt*, what not.

Objected, 1. 'tis provided by the statute *de donis*, &c. that as to the issue, *Finis ipso jure sit nullus*. 2. That the statute of 27 E. 1. extends not to the heirs in tail, as 8 H. 4. is; for the issue is not bound by any Record, which inures by way of Estoppel. 3. 27 E. 1. speaks *De finibus ritè levatis*, and when there wants seisin (which is the essence of a fine) 'tis not *ritè levatus*, 46 E. 3. that 'tis a good Plea.

Ans.

Answered : The statute *de donis, &c.* was made 13 E. 1. and the statute of fines, 27 in which the issue is not excepted, therefore he is bound, and accordingly there is a good opinion, 8 H. 4.

To the second, though the Issue was not barred of his right before, 4 H. 7. yet he was estopped to say, *Quod partes Finis nihil habuerunt.*

To the third, *Finis ritè levatus*, is intended in due form of Law, which it may be, though it be only by way of collusion; for the same Act ousts the parties from such averment; and 46 E. 3. is to be intended of a collateral ancestor, from whom the heir doth not claim the Land, and then the averment is good.

In *Conishies Case* 'twas resolved, upon a fine levied to tenant in tail in remainder, by tenant for life, and a grant and tender of a rent, that this was not within the statutes of 4 H. 7. or 32 H. 8. for the fine was not of the land it self which was intailed, but of the rent newly created out of the land. And in the *Lord Zouches Case*, 'twas resolved, that 4 H. 7. and 32 H. 8. do extend to fines levied by collusion, and shall bind, though *partes, &c. nihil habuerunt*; as if tenant in tail makes a Feoffment, or be disseised, and levies a fine: for the statute says, (*All Fines of any lands, &c. in any wise intailed to the person so levying, or to any of his ancestors*) and in 4 H. 7. the exception, *quod partes, &c. is saved to all persons not party, nor privy to the said Fine*; and the issue in tail is privy, for he claims as heir by descent, and if such fine shall barr, where the tenant in tail had nothing, though the issue enter after the death of the ancestor, before all the Proclamations pass; à fortiori here, when tenant in tail, at the time was seised of an estate, though 'twere in reversion. See *Archers case*, where a fine shall barr the Issue, where the Father had only a possibility at the time of the fine levied.

Paylowes Case, 32 of the Queen, tenant in tail levies a fine, Term. H. and T. and died in August next his daughter (being heir to the tail) & her husband brought a *Formedon*, and pending the plea, the proclamations passed, and, 'twas agreed by the Court that the tenant shall plead the fine, and the Proclamations which passed pending the Writ, and shall bar the Demandant, yet there the issue did all that might be done; for the conveyance is the fine, and the Proclamations are but a short repetition of the fine. Out of this, four things are to be observed. 1. Though after the fine, a right descends to the issue, yet, after Proclamations, the right is barred. 2. Though he pursues a *Formedon*, yet after Proclamations, he is barred, *ergo*, in the principal case he is barred, notwithstanding his entry or claim *in pais*. 3. When tenant in tail levies a fine, and dies before proclamations, the issue is not within any of the *savings*, for then the bringing of a *Formedon* should avoid the bar. 4. The proclamations serve for no purpose, but to distinguish the fine, from a fine at the common Law. *Trin. 4.* of the Queen *Bendlowes*, tenant in tail, disseised the discontinuee, and levied a fine, and took an estate by render, the discontinuee enters, and claims, before all the proclamations passed, and avoids the estate, after the proclamations pass, tenant in tail continues his possession, and dies within the year, after the entry and claim. Resolved, that the issue was not remitted, but barred by 32 H. 1. Though the estate was avoyded, before all the proclamations passed.

Resolved, though the issue be beyond the Sea, yet, because he is privy, &c. he is bound, as if he were within age, covert, or *non compos*. Which was agreed by all the Justices: *Ergo*, the claim of the issue is not material; and if infancy, &c. should avoid the fine, no man should be assured of land conveyed.



THE FOURTH BOOK.

*Vernons Case, 14 & 15 of the
Queen, fol. 1.*



IN dower, the tenant shews that the husband made a feoffment of other land to the use of himself for life, and after to the use of the demandant for life, &c. and avers that the said estate was for her Joynture, &c. and that the Demandant had entered, &c. and agreed to the estate; the Demandant shews that the estate was upon condition, for to perform the will of the Husband, and that divers things were to be performed in it, judgment if the tenant shall be admitted &c.

Resolved, that at Common Law, a right or title to a Freehold, cannot be barred by acceptance of a collateral satisfaction, or recompence As if a disseisor of the Mannor of P. gives to the Disseisee the mannor of S. in satisfaction of all his right, &c. And therefore 'tis said in our Books, that an accord with satisfaction is a good Plea in a personal action, where damages are to be recovered, not in a real; and therefore no barr in Dower, but Dower *ad ostium Ecclesie*, or *ex assensu patris*, concludes her, if she enters after, &c. for the Law allows them, &c. to be Dowers in Law. Before 27. most lands were in use, and because wives were not dowable of the use, estates were made by the Feoffees, to the husband and his wife, before, or after

after the marriage for life, &c. for a competent provision for the wife; then 27 transferred the possession to the use, and if further provision had not been, the wives should have their dowers and jointures also: and therefore those branches were made in the same Statute of 27.

Resolved, that the Feoffment to the use of himself for life, the remainder to his wife for life, for the jointure of the wife, is within 27. for though that five estates only are expressed. 1. To the husband and wife, and the heirs of the husband, &c. 2. To the heirs of their two bodies. 3. Of the body of one of them. 4. For their lives. 5. To the husband and wife for life of the wife, yet, many other estates are within the act, for these are put for example, not to exclude others: but resolved, that no estate is a jointure, except it takes beginning presently after the death of the husband; for so, are all the examples: and therefore to himself for life, the remainder to B, for life, the remainder to his wife, &c. is not within the Statute, &c. and therefore though the wife enter, and takes the profits, she shall have Dower. An estate to one and his wife, and the Heirs males of their two bodies, adjudged a good jointure, yet none of the five estates mentioned; an estate made to a woman for life, before marriage, adjudged a good jointure.

Resolved, though the estate here were upon condition, and though Dower (in place of which the jointure comes) were absolute, yet because an estate for life upon condition, is an estate for life, 'tis within the words, and the intent of the Act, if the wife accept it, &c.

Resolved, that a wife cannot waive a jointure made before the coverture, as she may a jointure made after; and this by the *Proviso* (if any woman hath lands, &c.

&c. assured after marriage for her life, &c. after death of the husband she hath liberty to refuse, &c.) and therefore the intent of the statute, was, that she should not refuse a joynture made before, and land conveyed for part of her joynture, or in satisfaction of part of her Dower, is no bar of any part, for the incertainty; for the statute says, for the joynture of the Wife's, and not for part of the joynture.

Resolved, That though the estate of the Wife be upon an expresse condition, for to perform the will, which imports a consideration of making the estate; yet, it may be averred for joynture, for the one consideration well stands with the other, and though it be not expressed in the Deed, yet it may be averred: and the case is the stronger, because the averment is given by the words of the act. And a Fee simple to the wife, in satisfaction of her Dower, is a joynture within the equity of 27, for the reasons aforesaid: as also because 'tis within the expresse words (*for term of life, or otherwise*) for all estates as beneficial, or more, are within, by this word, *otherwise in joynture*, after judgement was given against the demandant.

And devise to a wife for a life, in tail, &c. for her joynture, is a good joynture within 27. as 'twas resolved in *Leake and Randals Case*. Otherwise, where a man devises to his wife for life, &c. generally this cannot be averred to be for joynture, and therefore no bar of Dower. 1. Because a devise imports a consideration in it self, and shall be taken as a benevolence, 2. All the will for land by 32 & 34 H. 8. ought to be in writing, and no averment ought to be taken out of the will, which cannot be collected by the words within; an estate before marriage is within the equity of the statute; so an estate by devise, which takes effect after the marriage dissolved, is within 27.

Bevills Case, 27 & 28. of the Queen, fo. 8.

TENANT by Homage, Fealty, and Escuage, and sure to Court twice a year ; the Lord was seised of Fealty only by the hands of the Tenant. Resolved, that seisin of Fealty, was a seisin of all the said services ; for when the Tenant doth fealty, he takes a corporal oath, that he shall be faithful and true to the Lord, and shall bear him faith of the tenements, which he claims to hold of him, and that he will lawfully do the customes and services, &c. And though Homage be more honourable, and the most humble service, that a Freeholder can do to his Lord, yet Fealty is the most sacred service ; for this is done upon oath, not the other. And the words (*shall be faithful and true*) are also parcel of Homage ; and seisin of any part of any service, is a seisin of the whole, and the Law, for this reason, so respects these services, that no distress for them shall be excessive, and though distress be so often, that the tenant cannot manure his land, he shall not have an Assize, as for rent, or other profits.

Resolved, that seisin of a superior service, is a seisin of all inferior services incident to it, as a seisin of escuage, of homage and fealty, homage of fealty, rent of fealty, where the Seigniorie is by fealty, and rent. Resolved, that doing of homage, is a seisin of all services, inferior and superior, because he takes upon himself to do all services. Resolved, that seisin of rent of sute, or of other annual service, is seisin of escuage, homage, fealty, ward, relief, heriot-service, service for to cover the hall of the chief house of the Mannor, for to impale the Barke of the Lord, or such casual services, which perchance will not fall in sixty yeares, but seisin of one annual service is not seisin

seisin of another annual service, as rent, of sure nor of work dayes, for 'tis the folly of the Lord, that he attained not seisin, and it should be mischievous to the tenant, for perhaps in ancient time the work-days are discharged, which now cannot be shewn.

Note (Reader), All this is to be intended of a seisin in Law; for seisin of fealty here, is no actual seisin of homage, nor of sure, nor fealty of rent; but seisin of any part of a service, is an actual seisin of all to have an Assize. And as to make avowry, seisin in Law suffices; but as for an assize actual seisin is requisite; so in a writ of right of land. See the book at large, and there, where ancient seisin to an estate is altered, or changed from one person to another, shall be sufficient, where not.

Resolved, that seisin in Law was sufficient to make an avowry within the letter, and the intent of the statute of 3 H. 8. for the intent was to limit a time, within which, seisin ought to be had, not to exclude any seisin, which was a lawful seisin by the common Law, which appears by the preamble. Also, the former acts of limitation, as W. 1. ca. 38. W. 2. ca. 2, do not exclude a seisin sufficient at Common Law. And the statute saith, (*Actual possession or seisin*) which (*Seisin*) is either actual or in Law.

Resolved, That the act doth not extend to such a rent or service, which by common possibility cannot happen within sixty yeares, as homage, fealty, for the Tenant may live beyond, or to cover the Hall, or to go in war, so of a *Formedon in Descender*, for Tenant in tail may live sixty yeares, after discontinuance, and although *In fact* he dyes, and the issue doth not pursue his *Formedon*; yet, he may have it at any time, and the seisin of the Donee was not traversable; so of homage and other casual services, though the Lord might have had seisin. So, if the Lord release to the

tenant, so long as I. S. hath heirs of his body, though sixty yeares pass, yet he may distrain, for *impotentia excusat legem*, and there may be a tenure by homage, &c. and yet never done, as if the land be conveyed to a Maior, &c. or other Corporation aggregate of many, they hold by fealty, yet they cannot do it. A Writ of Escheat, *Cessavit*, *Rescous*, are not within the Act, for in them the seisin is not traversable, but the tenure, and in the Escheat and *Cessavit*, they demand the land and can lay no seisin, and the Act extends only to those Writs where the Demandant or his Ancestors might have had seisin. So, *Note*, Land shall escheat, though there be no seisin of the services, within the time of limitation, for the Seignory remains, though seisin wants; so if the Tenant cels, and the land be not overt, and sufficient to his distress, the Lord shall have a *Cessavit* though he wants seisin of the service. Resolved, if nothing be arrear, and the Lord distreins, the Tenant may make rescous, or if he be so often distreined, that he cannot manure his land, he may have an assize *De souent distress*, but for such tortious distress where nothing is arrear, the Tenant shall not have Trespass, *Vi & armis* against the Lord, for this is prohibited by the statute of *Mertbr.* ca. 3. See the Book at large in what case an incroachment of more rent by the Lord than he ought to have, shall be avoyded, in what not.

Resolved, that though a man hath been out of possession of land by sixty yeares, yet if his entry be not taken away, he may enter. & bring any possessory action of his own possession, for the first clause doth not bar any right, but prohibits that none shall have a Writ of right, &c. of the Possession of his Ancestors, &c. but only of a seisin within sixty yeares; the first and second clause extend only to seisin ancestrall,

cestrell, the third to an action of his own possession, not to entry, the fourth by avowry, the fifth to a Forfeiture, &c.

Note, (Reader) out of this, that when the tenant hath done homage and fealty, which the Lord may enforce him to do, this shall be a seisin of all other services, as to avowry, though the Lord nor those by whom he claims had seisin within sixty years.

Actions of Slander.

The Lord Cromwells Case, 20. of the Queen, fo. 12.

THe Lord Cromwell brought an action *De scandalis magnatum*, against D. Vicar, *Tam pro domina regina quam pro seipso*, upon the statute of 2 R. 2. ca. 5. The Defendant said to the Plaintiff, *It is no marvel though you like not of me, for you like of those that maintain sedition against the Queens proceedings*; the Defendant justifies especially that he being Vicar of *N.* the Plaintiff procured I T. and I H. for to preach there, who in their Sermons inveyed against the Book of Common-prayer, and affirmed it to be superstitious; upon which the Vicar inhibited them, for they had no license nor authority to preach; yet they proceeded by the encouragement of the Plaintiff; and the Plaintiff said to the Defendant, *Thou art a false Varlet, I like not of thee*; to whom the Defendant said, *It is no marvel though you like not of me, for you like of those (innuendo, the aforesaid I. T. and I. H.) that maintain sedition (innuendo feditiosam illam doctrinam) against the Queens proceedings.*

Resolved in this case, that the statute aforesaid concerning the King, the Judges *Ex officio*, ought to take notice of it, as they ought of all statutes that concern

Resolved, that the justification is good, for in case of slander, the sense of the words is to be taken, which may appear by the occasion of speech : *Sensus verborum ex causa dicendi accipiendus est, & sermones semper accipiendi sunt secundum subjectam materiam.* And here the sense of the words appears, and his meaning in speaking them, and that he did not intend any publique or violent sedition, as the word of it self imports; and God defend, that the words of one by a strict and grammatical construction, should be taken contrary to the manifest intent; as in an Action for calling the Plaintiff murderer, 'tis a good justification that the Plaintiff confessing, that he had killed divers Hares with Engines, the Defendant said, *Thou art a murderer*, and the Defendant shall not be put to a general issue, when he confesses the words, and shews that they are not actionable, as in Maintenance, the Defendant may justifye lawful maintenance; whereupon the Plaintiff replied that the Defendant, *dixit, &c. Verba prædict. de injuria sua propria absq; tali causa*, upon this they were at issue, and after agreed.

Cutler and Dixons Case, 27 and 28 of the Queen, fol. 14.

IF one exhibite certain Articles to a Justice of peace against one, declaring divers great abuses and misdemeanours, &c. to the intent to bind him to the good behaviour; In this case the party accused shall not have any action upon the case, for it is in pursute of ordinary justice, and if such actions were permitted, none would complain for fear of infinite vexation.

Sir *Richard Buckley and Woods Case*, 33 and 34, of
the *Queen*, fol. 14.

Wood exhibited a Bill in the Star-Chamber against Sir R. B. and charged him with divers matters examinable there, and with other matters not determinable there, as that he was a maintainer of Pirates and Murtherers, and a procurer of Piracies, upon which Sir R. B. brought his action, &c. Resolved, that no action lyes for matter examinable there, though 'twas meerly false, because that 'twas in course of justice.

Resolved, that an action lyes for these words, not examinable there, for 'tis not done in course of justice, and great inconvenience would follow, if matters may be inserted in Bills exhibited in so high and honourable a Court in Slander of the parties, and they cannot answer there for their purgation, nor have their action for purging themselves of the crimes, and recover damages for the wrong, but that the said Bill shall remain alwayes of record to their infamy, and here no murther or Piracy can be punished upon any Bill exhibited in English, for he ought to have been indicted, and therefore he hath not only mistaken the Court; but also, the nature of exhibiting the Bill, hath not appearance of any ordinary course of justice, but no action lyes upon an appeal of murther, returnable in the *Common Bench*: for though the *Writ* is not returned before competent Judges, who may do justice, yet 'tis in nature of a lawful Sure, namely, by Writ of appeal; wherefore judgement was given for the Plaintiff. And in a Writ of error in the *Chequer Chamber* brought by *Wood*, 'twas resolved, that Sir R. B. might have had a good action; but here, because the action was not up-

on the Bill exhibited at *Westminster*, but because he said in the Country of S. that his Bill was true, *In auditu quamplurimorum*, without expressing the said matters in particular, so that it was not any Slander, judgement was reversed.

Stanhop and Bliths Case 27. of the Queen, fo. 15.

MAfter *Stanhop* (who was a surveyor of the Dut-
chy, and had divers Offices, and was a Justice
of Peace) hath but one Mannor, and that he hath
gotten by swearing, and forswearing. *Resolved*, that
the Action doth not lie, for they are too general, and
words which charge any one, in an action in which
damages shall be recovered, ought to have convenient
certainty; and he doth not charge the Plaintiff with
swearing, &c. and he may recover a Mannor by swear-
ing, &c. yet not procuring or assenting to it. *Resol-*
ved, if one charge another that he hath forsworn
himself, no action lies. First, because he may be for-
sworn in usual communication, *Quia benignior sen-*
sus in verbis generalibus seu dubiis, est praeferenda. Se-
condly, it is an usual word of passion and choler, as
also to call another a Villain, a Rogue, a Varlet,
these and such like will not maintain action, *Boni*
judicis interest, lites dirimere. But if one say to ano-
ther, that he is perjured, or that he hath forsworn
himself in such a Court, &c. for these words an
Action will lie.

Hext Justice of Peace against Ycomans,
27. of the Queen, fo. 15.

For my ground in H. Hext seeks my life, and if I could
find one I. H. I do not doubt, but within two dayes,
to Arrest Hext for suspicion of Felony. Adjudged that no
action

action lyes for the first words : 1. Because he may seek his life lawfully upon just cause , and his land may be holden of him. 2. 'Tis too general, and the Law inflicts no punishment for seeking of his life ; but adjudged that the action lies for the last words : for, for suspicion of felony, he shall be imprisoned, and his life in question.

Birchleys Case, 27 and 28 of the Queen, fol. 16.

THe Defendant said to B. (Clerk of the Kings Bench, and sworn to deal duly without corruption) *you are well known to be a corrupt man, and to deal corruptly.* Adjudged that the action lies ; 1. Because the words, *Ex causa dicendi*, imply that he hath dealt corruptly in his profession, *Et sermo relatus ad personam intelligi debet de conditione persone* ; 1. This touches the Plaintiff in his oath ; 2. The words scandalise him in the duty of his profession, by which he gets his living. *Skinner of London* said, that *Manwood* was a corrupt Judge ; adjudged actionable. Resolved in this case, that if the precedent parlance had been, that B. was a Usurer, or executor of another, and would not perform the will, and upon this the Defendant had spoken the words following, No action would lye:

Weaver and Caridens Case. 37 of the Queen, fo. 16.

Adjudged, that no action lyes, for saying, that the Plaintiff was detected for perjury in the Star-Chamber ; for an honest man may be detected, but not convicted.

Stuckley and Bulheads Case, 44. and 45, of the Queen, fol. 16.

ADjudged, that an action lyes for saying, *Master Sr* (he was a Justice of Peace) *covereth and hideth felonies, and is not worthy to be a Justice of Peace, for this is against his Oath, and his Office, and a good cause to put him out of Commission, and for that he may be indicted and fined.*

Snag and Gees Case, 39. of the Queen, fo. 16.

THou hast killed my wife, and art a Traytor. Adjudged that the action will not lye, for the wife was in life, as appeared in the Declaration, and so the words vain and no scandal, otherwise if she had been dead.

Eaton and Allens Case, 40. of the Queen, fo. 16.

HE is a brabler and a quarreller, for he gave his Champion counsel to make a Deed of gift of his goods to kill me, and then to fly out of the Country, but God preserved me. Resolved, that the action will not lie, for the purpose without act is not punishable; and though he may be punished for such conspiracy in the Star-chamber, yet this is by the absolute power of the Court, not by ordinary course of Law. Observe well this Case, and the cause and reason of this judgement.

Anne Davies Cases 35. of the Queen, fo. 16.

THe Defendant said to B. (a Sutor to the Plaintiff, and with whom there was near an agreement of marriage) *I know Davies daughter well. she did dwel in Cheap side,*

cheapside, and a Grocer did get her with Child; and the Plaintiff declared, that by reason thereof, the said B. refused to take her to wife.

Resolv. The Action lyes: for a woman is punishable for a Bastard, by 18 of the Queen, *cap. 3.* And though that fornication, &c. is not examinable by our Law, because done in secret, and uncomly openly to be examined; yet the having a Bastard is apparent, and examinable by the said Act.

Resolv. If the Plaintiff had been charged with nude incontinency only, the Action lyes; for the ground of the action is temporal, viz. the defeating of her advancement in marriage; By *Popham* an action lyes, for saying that a woman Inn-holder, had a great infectious disease, by which she loses her guests. *Banister and Banisters Case* 25 of the Queen. Resolved: That an action lyes, for saying the Son and Heir, that he was a Bastard, for this tends to his dis-inherison; but resolved, If the Defendant pretend that the Plaintiff is a Bastard, and he himself right Heir, no action lyes; and this the Defendant may shew by way of bar.

James Case 41 and 42 of the Queen, fol. 17.

THE Defendant said to B *Hang him (innuendo praedict. f.) he is full of the Pox (Innuendo, the French Pox) &c.* Resolv. Two things are requisits to have an action for slander. 1. That the person scandalized be certain. 2. That the scandal be apparent by the words themselves. And therefore if a man says, that one of the servants of B. is a notorious felon or traitor, an action lyes not (if he have more servants) and (*innuendo*) cannot make it certain. So, I know one near about B. that is a notorious Thief. But if two speak of B. and the one says, *He is a notorious Thief*, an action lyes,

lyes, and B. may reduce this to a certainty by (*innuendo prædict. B.*) for the office of an *innuendo* is for to design the person that was named in certain before, and in effect, stands in place of (*prædict.*) but *innuendo* cannot make that certain which was incertain before, and subject to a deceivable conjecture. But if one sayes to B. *Thou art a Traytor*, an action lyes, for *constat de persona*. So here, when two speak of the Plaintiff, and one sayes, *Hang him*, there *innuendo* will denote the person, but *innuendo* cannot extend for to make the intent to be the *French-pox*, by imagination, which is not apparent by the precedent words; and the words themselves shall be taken *in mitiori sensu*.

Oxford and his wife against Cross, 41 of the Queen, fo. 18.

THE Plaintiff brought an action in *London*, for calling the wife of the Plaintiff *whore*; the Defendant removed this out of *London* by *Habeas corpus*; a *procedendo* was prayed, because the action was maintainable in *London*, though not at *Common Law*; denyed by the Court, for such custom to maintain an action for brabbling words, is against Law.

Sir G. Gerard Master of the Rolls against Mary Dickenson, 32 & 33. of the Queen, fo. 18.

Intro. of case
of 17
fo. 17
THE Plaintiff counts that he was in communication with R. E. for to demise to him the Mannor, &c. The Defendant said (*Premissorum non ignora*) have a lease of 90 years of the Mannor, and then shewed and published a Demise made by the Lord Audley, grandfather of the Lord A. from whom the Plaintiff claims, where in truth the Defendant knew this to be

be counterfeit, by reason of which, &c. R. E. did not proceed, &c. the Defendant pleaded, *Quod talis Indentura* (*qualis* in the count) came to his hands by Trover, and traversed, that he knew of the forgery.

Resolved, if the Defendant affirm and publish that the Plaintiff had not right, but that she her self had, no action lyes, though she hath no right, because she pretends title ; for if an action should lie, how could any one claim or sue, or seek counsel for any land ? *Banisters Case* before resolved according, and therefore 'twas here resolved, that no action lies for saying, *I have a lease, &c.* though it be false. And though it appears by the Barre that she had no title, but is a stranger ; yet, because the matter in the count doth not maintain the action, the Bar shall not make it good.

Resolved, that there was other matter in the count sufficient to maintain the action, *viz.* That the Defendant knew of the Communication, and that the Lease was forged, and yet published, by which, the Plaintiff lost his bargain.

Resolved, that the bar was insufficient: for the knowing of the Defendant or forgery, is not traversable; as in an action, for that the Dogge of the Defendant had bit the beasts of the Plaintiff, *Ipsè sciens canem suum ad mordendas oves consuetum*; (*Sciens*) is not traversable, but it ought to be proved upon the general issue, for (*sciens*) is not a direct allegation, nor alleged in any place. And *talis indentura, qualis*, is no direct answer to the Indenture mentioned in the count, for *talis non est eadem*, and no *simile est idem*.

Barhams Case, 44 & 45. of the Queen, fo. 20.

M After Barham did burn my barn (*innuendo* a barn with Corn) with his own hands, and none but he.
Moved

Moved in arrest of judgement that the words were not actionable, for 'tis not felony to burn a barn, if it be not parcel of a mansion house, or full of corn; and in such case *agitur civiliter, not criminaliter, & verba accipienda sunt in mitiori sensu*. And the (*innuendo*) will not serve, when the words are not slanderous,

Britteridges Case, 44 & 45 of the Queen, fo. 19.

B Is a perjured old knave, and that is to be proved by a stake parting the Land of A. and B. Resolved, that the action lies for the first words. And adjective words will maintain an action, when they presume an act committed (as here) or when they scandalize a man in his office, or function, or trade by which he acquires his living. *Philips*, Bachelor of Divinity, brought an action against B. for saying; *Thou hast made a seditious Sermon, and moved the people to sedition this day*; adjudged the action lies, because though the first part of the words were merely adjective, they scandalized him in his function. So, if a man sayes to a Merchant, that he is a *bankruptly knave*, or a *bankrupt knave*, as 'twas adjudged in *Mittons case*, or that he will be a *bankrupt* within two dayes; but an action lies not when these adjective words import not an act done, but an inclination, which doth not scandal him in function, &c.

Resolved, in the case at barr, that upon all the words together, no action lies, for the last words explain his intent to be, of no judicial perjury. And 'tis not possible that a stake can prove a man perjured; as it hath been adjudged; *Thou art a Thief, for thou hast stolen my apples out of my Orchard; or robbed my Hop-ground*, *Dobbins & Franklins Case*, 43 & 44 of the Queen, but if the counsel of the Plaintiff had disclosed the truth of the case in the count, an action would

ib. 4. *Palmer and Thorps Case.* III

ould lye, for in truth, there was a controverſie between two, whether the ſtake ſtood upon the land of the one, or the other, or as an indifferent boundary, and the Plaintiff was depoſed in an action for this, as a witneſs ; and by the pretence of the Defendant had perjured himſelf in his Depoſition.

*Palmer and Thorps Case, 25 of the Queen, fo. 20.
touching defamation in the Eccleſiaſtical Court.*

Reſolved, that ſuch defamation ought to have three Incidents. 1. That the matter be meerly Spiritual and determinable in the Eccleſiaſtical Court, as for calling Heretick, Schiſmatick, Advowterer, Fornicator. 2. It ought to concern matter meerly ſpiritual only, (for if it concern any thing determinable at Common Law, the Eccleſiaſtical Judge ſhall not have conuſance of it. See for this 22 E. 4. 20. the Abbot of St. Albons Case. 3. Though the thing be meerly ſpiritual, yet he which is defamed cannot ſue there for amends or damages, but the ſute there ought to be only for puniſhment of the offender, pro ſalute anime. For this, ſee *Articulis cleri, & circumſpecte agatis*, & Fitz. 51, 52, 53. But the Plaintiff ſhall recover coſts there, and there if the Defendant do redeem his penance, agree to pay a certain ſum, the party may ſue for this there, and no Prohibition lyes.

Copy-hold Caſes.

Browns Case, 23 & 24. of the Queen, fo. 21.

Copy-holder in fee, by licence, leaſes for years, and dyes, the eldeſt ſon dyes before admittance,

rance, adjudged that the daughter of the intire blood shall have it, not the younger sonne. Resolved, though a Copy holder, in judgement of Law, hath but an estate at will, yet custom hath so established and fixed his estate, that by the custom of the Manner 'tis descendable to his heirs, and is not merely *ad voluntatem Domini*, but, &c. *secundum consuetudinem manerij*; so the custom is the soul and life of Copy-holds. See the book at large, of what antiquity Copy holds are, and some general learning concerning them.

Resolved, when custom hath created such inheritances, the Law shall direct the descent according to the Maxims and rules of the Common Law, as incident to every estate descendable. When uses had gained a reputation of inheritances, the Law directed the descent, and of them there shall be a *possessio fratris*. But resolved, that such customary inheritances shall not have any collateral qualities, which do not concern descent of inheritance, which other inheritances have; and therefore they shall not be affects to the heir, upon an obligation, nor there shall not be Dower, nor tenancy by the courtesie, nor a descent shall toll entry, &c. For, as without custom they cannot descend, so without custom they cannot have a collateral quality; for Copy-holders have inheritances *secundum quid*, viz. to descend to the heirs, and not to be determined by the will of the Lord, nor *simpliciter* to a collateral quality.

Resolved, that the heir, before admittance, may take the profits, and may surrender to the use of another, before admittance; but this shall not prejudice the Lord for his fine upon the descent, and he is a tenant by Copy of Court-roll, for the roll made to his Ancestor belongs to him, and admittance of tenant for life shall serve for the remainder, yet, it shall not prejudice the Lord for his Fine. And though

'twas objected, that every admittance amounts to a grant, and so may be pleaded, and therefore nothing vests before admittance; yet 'twas resolved, that, as after admittance, the heir may in pleading alledge this as a grant, and this to avoid inconveniences (for, if he should be compelled to shew the first grant, it was before time of memory, and so not pleadable, or if within memory, then the custom fails) yet, he may alledge the admittance of his Auncestor, as a grant, and shew the descent to him, and that he entered, and this without admittance, but he cannot plead, that his Father was seised, &c. by Copy, &c. and dyed seised, and that this descended, &c. For in truth, 'tis but a particular estate at will in judgment of Law, though descendable by custom.

Ryvets Case, 24 of the Queen, fol. 22.

A Greed, that a Husband shall not be tenant by the Courtesie of a Copy-hold, without special custom.

Deale and Rigdens Case, 36 of the Queen, fol. 23.

A Djudged, that if a recovery be in plaint in nature of a real action, against tenant in tail (admitting Copy-hold may be intailed) that this is a discontinuance; for, in as much as plaints are warranted by custom, 'tis incident, that it should make a discontinuance. The like judgment was between *Clun and Pease*.

Butlock and Dibleys Case, 35 of the Queen, fol. 23.

R Esolv. That a surrender by the husband is no discontinuance to the Wife, nor her heirs. And if a
I Copy-

Copy-holder for life surrender to the use of another in fee; this is no forfeiture, for it doth not pass by livery. And Copy-holders have no such quality, without special custom; so also adjudged in several Cases.

Gravenor and Teds Case, 35 of the Queen, fo. 23.

RESOLVED: That the descent of a Copy-hold, doth not toll entry; and that where the custom was, that he may grant in fee simple, that he may, by the same custom, grant to a man, and the Heirs of his body; for, be it a fee-simple conditional, or a tail, 'tis within the custom; so, of a grant for life, or years, for fee-simple includes them.

Finch and Huckleys Case, 36 of the Queen, fo. 23.

RESOLVED: That admittance of a Copy-holder for life, is an admittance of him in remainder, but not to prejudice the Lord for his Fine. And that upon a surrender to the use of himself for life, and after to the use of his last will, that the fee remains in the Copy-holder, not in the Lord.

Clark and Pennifathers Case, 26 of the Queen, fo. 23.

RESOLVED: That the Heir of a Copy-holder may enter, and have trespass, before admission; and if the Heir (as the principal case was) dye before admission, his Heir may take the profits, and have trespass. And *Wray* said, That 'twas adjudged, that there shall be *possessio fratris* of it. Resolv. That where *H. 8.* granted a Mannor to the Queen for life, that the Queen was a sole person exempted by common law, and may make a lease, or grant, without the King, and

may plead, and be impleaded: and that 32 H. 8. is
but a Declaration of the Common Law.

Adjudged, that a grant of a Copy-hold in fee, es-
cheated to her, by the Queen Tenant for life, binds
the King, his Heirs and Successors; for she was *domina*
pro tempore, and the custom of the Mannor binds the
King. And that every one, who hath a lawful interest
in a Mannor, &c. though but at will, may grant
Copy-holds, escheated, &c. rendring the ancient rent,
customs and services, and this shall bind the Lord,
for he is *dominus pro tempore*. For a Copy-holder de-
rives not his interest out of the estate of the Lord
only, but out of the custom, and the grantee is in
that, without regard to the estate or person of the
grantor; and therefore such a grant by the Husband
shall bind the wife; so, of Infants, *non compos mentis*,
Bishop, Prebend, Parson, shall bind for ever, for the
custom is, that the Tenements are parcel of the
Mannor, and demised, and demisable, &c. But the
Lord must have a lawful estate; for, if a disseisor, or
coffee of a disseisor, &c. makes such grants, this shall
not bind him that hath right, after a re-continuance
of the Mannor: But admittance by such upon a sur-
render, or of the Heir shall bind, &c. for they are
lawful, & *quodam modo* judicial acts; which to do,
he may be compelled in a Court of equity.

P. 29 of the *Queen*, fol. 24.

Adjudged, if a Lord takes wife and a Copy-holder
for life (according to the custom) dyes, and
the Lord re-grants for lives, and dyes, that the wife
in Dower, shall not avoid these grants; for though
the grant were after the title of Dower, yet, the cu-
tom was before. If a Feoffee upon condition, makes
a voluntary grant, the condition is broken, the
feoffor re-enters, the grant shall stand.

Rous and Arters Case, 33 of the Queen, fol. 34.

ADjudged, that if Tenant *pur auter vie*, of a Mannor, after the death of *cestuy que vie*, continues in, and holds Courts, and makes voluntary grants; this shall not bind the Lessor (otherwise the admittances upon surrenders, or descents) for he was tenant at sufferance, who hath no lawful interest, and a writ of entry *ad terminum qui prateriit* lyes against him, and so he is a deforcor.

Murrell and Smiths Case, 33 and 34 of the Queen, fol. 24.

THe Queen grants a Copy hold in fee, and after grants the inheritance of the Copy-hold to a stranger; the Copy holder devises to M. and after surrenders to the use of his will. Resolv. That custom hath so established the estate of a Copy-holder, that by severance of the inheritance of the Copy-hold from the Mannor, the Copy-hold is not destroyed; for, being the Lord himself could not ouste the Copy-holders, no more can another claiming in by him. Objected, That every Copy-hold ought to be parcel of the Mannor; and to be demised, or demisable, time out of memory. Resolv. That because once this hath both the Incidents aforesaid, and its perfection, the severance made by the Lord shall not destroy it.

Resolv. That notwithstanding the surrender, and devise, the Copy-hold descended to the heir; for after the severance of the inheritance from the Mannor, the surrender was utterly void; for, the land was not parcel of the Mannor at the time, and the devise only cannot transferr such a customary estate, but ought to be by surrender into the hands of the Lord &c.

Resol

Resolv. That after severance, the Copy-holde shall pay his Rent to the Feoffee, and shall pay, and do other services which are due, without admittance or holding of a Court, as to plough the demesns of the Lord, Heriot, &c. but suit of Court, and fine upon alienation or admittance, are gone, for now the land cannot be alienated; for though the Copy-holder hath some benefit by the severance, as appears before, so he hath great prejudice; for now he cannot surrender, or alien his estate, nor the Feoffee cannot make an admittance, for he is not *dominus pro tempore*.

Resolv. That such forfeitures remain, as were before the severance, as feoffment, lease, waste, denier of rent: So, if the land were of the nature of Borough English, of Gravelkind, and other customs which run with the land, remain. And 'twas said, that such Copy holder hath no other means to alien, but by Decree in Chancery against him and his Heirs; but, by this, the interest of the land is not bound, but the person only.

Kite and Queintons Case, 31 of the Queen, fol. 25.

Copy-holder in fee surrenders out of Court, by the custom, to the hands of certain Copy-holders, to the use of another and his Heirs, upon certain condition; at the next Court, the surrender was presented, but the condition omitted; he, to whose use, &c. dyes, the Lord admits his heir, he that made the surrender, releases to the heir being in possession, and after enters.

Resolv. That the presentment of the surrender was void, for that the condition was omitted; for the surrender that the Copy-holder made, was not presented; but if the surrender & the condition had been presented, and the Steward in entring of it, omits the

condition, upon sufficient proof of it, the Surrender shall not be avoided, but the roll amended; for the roll doth not conclude the party for to plead, or give in evidence the truth of the matter.

Resolved: If a Copy-holder be ousted by wrong, a release to him by the disseisor, doth not transfer his right, because he hath not any customary estate upon which the release of the customary right may inure, and this should be prejudicial to the Lord; for, by this, he shall lose his fine and services; but a release made to him which is admitted by the Lord, and in possession, is good; and a release of a customary right may inure to him, and the Lord not prejudiced, and the release shall inure by way of extinguishment. And *Littleton* speaks of an alienation by surrender only, which ought to be into the hands of the Lord, but a release cannot be done to the Lord, and *Littleton* sayes, He which claims a Copy hold by surrender, hath no other evidence; but he which claims an extinguishment of a right, may have it by release, by deed, and 'tis no peril to purchasers; for if the Copy-holder in possession sells it, he will shew the release, and he which is out of possession cannot sell, till he hath gained the possession, & caveat emptor. By *Wray*, if he which hath a pretended title &c. to a Copy hold, bargains, &c. this is within 32 H. 8. for the statute sayes (any right or title) and great part of the Land within the Realm is in his Copy; and therefore the intention was to include them to avoid maintenance and champerty.

Melwich and Luters Case, 30 of the Queen, fol. 29

RESOLV. That the lessee of a Copy-holder for year, shall maintain an *Ej³*, *Firma*, for his term being warranted by Law, by force of the general custom

custom of the Realm, 'tis reason that he should have remedy by *Ej. Firmæ*; and this is a speedy course against a stranger. Resolved: That the Copy holds are not destroyed, by severance of the inheritance of them from the Mannor, but remain in force. So *Murrels Case* before adjudged.

Resolv. That when the Lord of a Mannor having many ancient Copy-holds in a Town, grants the inheritance of all the Copy-holds, the grantee may hold a Court for the customary tenants, and accept surrenders, and make admittances, and grants; for every Mannor which consists of Free-holders, and Copy-holders, comprehends in effect two several Courts; the one, the Court-Baron, for Free-holders, and in this the Suitors, *viz.* the Free-holders are Judges, and the other Court for the Copy-holder, and in this, the Steward, or the Lord, himself is Judge; and though this is not a Mannor in Law, because it wants Free-holders, yet the grantee may hold such Court as aforesaid, for Copy holders only, as the grantor himself might. So, if all the Free-hold Escheat, or the Lord releases the tenure, and services, yet he may hold a customary Court for the Copy-holds. *Note (Reader)* though the Lord, by his own act, cannot make of one and the same Mannor at common Law, divers several Mannors, consisting of Demeans and Free-holders, yet he may make a customary Mannor of Copy-holders.

Resolv. That the Lord himself may make a grant or admittance of a Copy-holder, out of the Mannor, at what place he pleases; but, if the Steward, at any Court holden out of the Mannor, shall make grants or admittances, they are void.

Neales Case, 37 of the Queen, fol. 26.

ADjudged, that where the Lord of a Mannor demises all his lands, granted by Copy, for two thousand years, that the Lessee may hold Courts for Copy-holders (as *Melwiches Case* is before) and 'twas said so to be resolved in *C. Hattons Case*. Note (*Reader*) a good diversity, where the number of the Copy-holders may support the custom, and a singular Case of a Copy-holder (as in *Murrels Case* before) in which case, the Lord doth not grant tacitly any customary Court.

Clifton and Molineux Case, 27 & 28 of the Qu. fa 27.

REsolv. If a Steward hold Court out of the Mannor, all grants and admittances there made, are void; for the Court ought to be holden within the Mannor, not out of the Jurisdiction of it (as *Melwich Case* is before) but, resolved that by custom the Court may be holden out of the Mannor, and grants &c. shall be good, as *Abbots*, &c. used for to hold Court at one Mannor, for divers several Mannors. Resolv. That if a woman Copy-holder for life, takes husband, who commits waste, and dyes, the Copyhold is forfeited; otherwise, if a stranger does waste, without the assent of the husband.

Taverner and Cromwells Case, 26 of the Queen, fo. 27.

REsolv. If a Copy-holder, seised of three several Copy-holds, of three several acres, makes waste in part of one, &c. all that is forfeited, but not the others; for though they are all in one hand, yet every one is severally holden, and a several condition in

[Law

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Law annexed, and the several conditions follow the several tenures. So, resolved, if the Copy-holder surrender them to the use of A. And the Lord admits A. *Tenendum per antiqua servitia inde prius debita & de jure consueta*; and A makes a forfeiture in one, he shall forfeit that only; for, the *Tenendum (reddendo singula singulis)* continues the several tenures, so that 'tis not material if the Copy-holds are in one, or several Copies. So, if divers several Copy-holds, escheat to the Lord, and he grants them *Tenendum per antiqua servitia*, they shall be severally holden as they were before, though he grants them to one man.

Resolv. That when he to whose use a surrender is made, is admitted, he is in by him that surrendred, and in a plaint in the nature of an entry in the *Per*, shall be supposed in by him; for the Lord is but an instrument to make the admittance, & his charge shall not bind him that is admitted. So (Reader) where before 'tis said, that by the forfeiture of the husband, all the estate of the wife shall be forfeited, 'tis to be intended, all the Copy-hold under the said tenures.

Hubbard and Hammonds Case, 42 and 43 of the Queen, fol. 27.

RESOLV. That if the Fines of Copy-holders upon Admittances, be incertain, the Lord cannot exact excessive and unreasonable fines; if he does, the Copy-holder may deny to pay it, without forfeiture, and it shall be determined before the Judges, upon a demurrer, or evidence upon proof of the value of the land, what fine was reasonable to be demanded; for if it should be otherwise, great part of the Copy-holds should be destroyed at the will of the Lord, and so was *Hodesons Case* adjudged.

Resolv: If the Lord assess a reasonable fine, and require

require the Copy-holder to pay it, he is not bound to pay it presently, because he could not know what the Lord would assess, & *nemo tenetur divinare*; and he shall have a convenient time to pay it, if the Lord limits no time; otherwise, of a fine certain.

Resolv. If a Copy-holder hath several Copy-holds, by several services, the Lord ought to assess and demand fines severally for every parcel, and the Tenant may refuse to pay his fine for one, and forfeit that only; and every several tenure hath several conditions in law tacitely annexed to it. So, if all the several Copy-holds are surrendered to the use of another, and the Lord admits him, *Tenendum per antiqua servitia*, &c. the tenures are several, and fines several. *Tavernors case* before. Resolv. That no fine is due to the Lord till admittance; for admittance is the cause of the fine, and if after the tenant deny to pay it, 'tis a forfeiture. *Bacon* and *Flatmans Case*, and *Sands Case* so resolved.

Westwick and Wyers Case, 43 of the *Queen*, fol. 28.

A Woman Copy-holder in fee, surrenders to the use of W. her Son in fee; and at the next Court, the entry was *ad hanc curiam venit*, W. & I. *uxor ejus*, & *ceperunt*, &c. W. dyed; I. his wife survived, and surrendered to the use of I. S. in fee. Resolved, when the Lord hath the Copy-hold by surrender to the use of another, he hath but a customary power, to make admittance *secundum formam & effectum sursum-redditionis*; and 'tis not like to the feoffee at Common Law; and though the Lord grant this by Copy to another, 'tis without warrant, and notwithstanding he might make an admittance, according to the surrender, and he which is admitted, shall be in by him that surrendered (as *Tavernors Case*

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 Case is before) and the Court agreed, if the Lord
 grant to *Cestuy que use*, and a stranger, all shall inure
 to *Cestuy que use*, or if he admits him upon condition,
 the condition is void. As executors agree that the
 legatory and I. S. shall have, &c. or, that the legato-
 ry shall have upon condition, the Legatory shall have
 only and absolutely; for after the assent of the Ex-
 ecutors, he is in by the Devisee. And 'twas said,
 That 'twas adjudged in *Bunnings Case*, that where the
 Lord admits one to hold to him and his heirs (where
 the surrender was for life only) that he hath but for
 life. Resolved, that without special custom, or
 other special matter, the admittance shall inure only
 to the Husband; and judgment was given ac-
 cording.

*Bunting and Lepingwells Case, 27 and 28 of
 the Queen, fol. 29.*

RESolv. That though T. who was Husband of the
 Wife, *de facto*, was not party to the Libel (for
 I. S. libelled against the wife, without naming her
 husband, for a divorce upon a pre-contract betwixt
 him and the wife) nor the sentence in the Spiritu-
 al Court, which dissolved the Marriage betwixt him
 and his wife, yet the sentence against the wife only,
 being but declaratory, shall bind the husband *de
 facto*, and for that the consufance of the right of Mar-
 riages belongs to the Spiritual Court, and they have
 given sentence in it, the Judges of the common Law,
 (though it be against the reason of the Law) shall
 give faith and credence to their proceedings and
 sentences, as consonant to the Law of holy Church;
 for, *Cuil bet in sua arte perito est credendum*. So, 'twas
 adjudg'd, that the Plaintiff (born in the second Mar-
 riage) was legitimate.

Resolv.

Resolv. When a Copy-holder surrenders to the Lord, to the use of his wife, and his younger son, without limiting any Estate, they have for life only; for, as well estates as discents, shall be directed by the rules of Law, as necessary consequents upon the custom, except there be a special custom within the Mannor, that *Sibi & suis*, or *sibi & assignatis*, may create an estate of inheritance; And 'twas observ'd, that the Estates limited upon surrenders, are alwaies annexed to the estates of him to whom the surrender is made, and alwaies the surrender to the Lord is general, without limitation of any estate. Resolved: That when the Lord admits *cestuy que use* for life, the reversion is in him that surrendred, not in the Lord, for he is but an instrument.

Resolv. That a man may surrender to the use of his wife, though that *cestuy que use*, is in by him that surrendred, because the husband did not do this immediately to the wife, but by a second means, viz. by surrender to the Lord, and by admittance of the Lord.

Resolv. That when B surrendred out of Court, and, before that 'twas presented in Court, he dyes, yet after, being presented according to the custom, 'tis good; otherwise, if it had not been presented according to the custom: so, if the Tenants in whose hands &c. dyes, yet if it be proved, 'tis good enough; so *Queintons Case* before, if *cestuy que use*, &c. dyes before admittance, his Heirs shall be admitted.

Down and Hopkins Case, 36 of the Queen, fol. 29.

Resolv. That where the custom of a Mannor was, to grant Copies for one, two, or three lives, that a grant to a woman during her viduity, is within the custom, or 'tis an estate for life; but every grant for
life

life is not *durante viduitate*, issue was, whether the custom was, that the wife of a Copy-holder after the death of the husband, should have for life, and 'twas given in evidence, that she should have during her viduity, and adjudged that the evidence did not maintain such custom, for 'tis a less estate than for life. But in the principal Case, 'tis a greater estate which is warranted by the custom, and therefore a less is within it (according to *Gravenors Case* before.) 'Twas said, that a Lord may retain a Steward by word, to hold Courts, &c. as a Bayliff, and this retainer shall serve till he be discharged.

Harris and Jeyes Case, 41 of the Queen, fol. 30.

RESOLV. That a Lord may retain one to be Steward of his Mannor, and to hold Courts by word, as in the Case before. RESOLV. That where a Copyhold escheats by attainder of felony of a Copyholder of the Queen, that the Steward may grant it over, *ex officio*, without special warrant, for the custom warrants the Steward to grant it; and this shall bind the Queen and her Heirs, &c. But yet his duty is before to inform the Lord Treasurer, Chancellor, or Barons of the Exchequer, or any of them, for his better direction.

RESOLV. That the Auditor or Receiver of the Queen, hath no power to retain a Steward to hold Courts, &c. But it behoves that the Steward (who makes such voluntary grants upon escheats, or forfeitures to be good) to have Letters Patents of the Stewards of the same Mannor.

And 'twas said, that 'twas adjudged in the *Lady Holcrofts Case*, that where one was retained generally by word, to be Steward of a Mannor, and to hold Courts, that he may take surrenders of customary tenants out of Court.

Shaw

Shaw and Thompsons Case, 33 of the Queen, fol. 30.

RESolved: That a woman shall not be indowed of Copy hold, without special custom; and that when a woman is to be indowed by custom, she shall have all incidents to Dower, and shall recover damages by the statute of *Merton*, because her husband died seised, and therefore the recovery of damage of 50 l. in the Court of the Mannor, was allowed, though this exceeded 40 s.

Resolved: That no Action of Debt lyes for these damages at common Law, for upon such judgment no errour of false judgment lyes, but the remedy is, in the Court of the Mannor, or Chancery. *Fenner* Justice, said, That he had seen a Record 36 H. 8. where the Lord by Petition to him, had for certain errors in the proceeding, reversed such a judgment, and upon this, the Defendant maintained an *Audita querela*, to be restored to the damages recovered against him. See 14 H. 4. cited before in *Browns Case*. And 7 E. 4. 29.

Hoe and Taylors Case, 37 of the Queen, fol. 30.

RESolved: That Underwood growing upon parcel of the Mannor, may by custom be granted by Copy of Court roll; and 'tis a thing of perpetuity, to which a custom may extend; for after every cutting the Underwood grows *ex stipitibus*. So, 'twas resolved, that Herbage, or any profit of any parcel of the Mannor, may by custom be granted by Copy; and 'twas said, that a fair appendant to the Mannor of C. in S is granted by Copy; and this example the reason of the first pillar in *Murrels Case*.

Frenches

Frenches Case, 18 & 19 of the Queen, fol. 31.

RESolv. If the Lord lease for years, life, or make any other Estate, by deed, or without deed, of Copy hold lands forfeited, escheated, &c. to him, that this land can never be granted again by Copy, for the custome is destroyed, for during these estates, the land was not demised, nor demisable by Copy. So, if the Lord make a feoffment, and enter for condition broken; but if the Lord keep it in his hands a long time, or leases it at will, he, his heirs or assigns may regrant it. So, if the interruption be tortious, as by disseisin, and discent, false verdict or erroneous judgment: for, *Nex valet impedimentum, quod de jure non sortitur effectum, & quod contra legem fit, pro infecto habetur*. But if it be extended upon a statute or recognizance acknowledged by the Lord, or if the Wife of the Lord hath his land assigned to her in Dower, though these impediments are by act in Law, yet for that the interruptions are lawful, the land cannot be after granted by Copy. If a Copy holder accept a lease for years of the Lord, of his Copy-hold, 'tis destroyed for ever. If a Copy holder take a lease for years of the Mannor, his Copy-hold hath not continuance, *Hides Case* adjudged 17 of the Queen. But there 'twas resolved, that such a Lessee might regrant the Copy to whom he would, for the land was alwaies demised or demisable. If a Copy-hold be surrendered to the Lessee, his executors or assigns may regrant it. If a Copy-hold escheat to the Lord, his alienee by fine, feoffment, &c. may grant it.

*Foiston and Crachroodes Case, 29 and 30 of the Queen
fo. 31.*

ADjudged, that where a Copy-holder in pleading alledges, *Quod infra Man. præd. talis habetur nec non toto tempore cujus, &c. habebatur consuetudo, viz. quod quilibet tenentes prædictorum tenement. vocat. C.* have used to have Common, in such a place, parcel of the Mannor, and that he is a Copy-holder of the said Tenement, that this custom, as well for the matter as the form, was good; for the Copy-holder cannot prescribe in his own name, for the exility and baseness of his Estate, and if he had claimed common in the soyl of another, he ought to prescribe in the name of the Lord, *Viz.* That the Lord, and all his Ancestors and all those whose estates, &c. have had common in such a place, for him, and his tenants at will; but when he claims this in the soyl of the Lord, he cannot prescribe in the name of the Lord, for the Lord cannot prescribe to have a Common, &c. in his own soyl, and therefore he ought to alledge, that within the Mannor there is such a custom.

Note, A good diversity between a prescription which is personal, and alwayes made in the name of a certain person, or his Ancestors, or those whose estates, &c. and a custom which is local, and alledged in no person, but that, within the Mannor, there is such a custom; this shall serve for those who cannot prescribe in their own name, nor in the name of any person certain, as the Inhabitants of a Town. Also, the allegation of a custom, shall serve, when it is referred to a thing insensible, *Viz.* That all such lands are devisable. And, for that in the principal case, the custom may have a lawful commencement, that one Copy-holder on'y shall have common, esto-

vers,

vers, or other profits in the land of the Lord, and that in many Mannors; some Copy-holders have common in one waste of the Mannor, and others in another severally, so that the custom cannot be applied to all: and because, that all the other Copy-holds may be determined & extinct, 'twas adjudged that the custome was well alledged. So, to have common of Estovers in the wood of his Lord, parcel of the Mannor, &c. was adjudged good; 10 of the Queen, as 'twas said.

Myttons Case, 26 Eliz.

Queen Elizabeth by Letters Patents did grant the office of the Clerkship of the County-Court of *Somerset* to *Mytton*, with all fees, &c. for life. *Arthur Hopton* Esquire, Sheriff of the same Shire interrupted him, because it was incident to his office. *Mytton* complained to the Lords of the Counsel, and it was referred to the two Chief Justices, *Wray* and *Anderson*. And after many arguments concerning the validity of the Grant, and conference had with all the other Justices, It was resolved by all the Justices, *Nullo contradicente aut reluctante*, that the said Letters Patents were void: and their reasons were, that the office of the Sheriff was an ancient office before the Conquest, and of great trust and authority, for the King committeth unto him *Custodiam Comitatus*: And though the King may determine the office *ad beneplacitum*, yet, he cannot determine this in part, as for one Town or Hundred, nor abridge him in any incidents to his office; for the office is intire, and ought to continue so without any fraction, or diminution without by Parliament, and the County Court, and the entering of all proceedings therein, are incident to the Sheriffs Office, &c. And though 'twas granted when

the office of the Sheriff was void, yet the new Sheriff shall avoid it; as *Scroges Case*, in the time of vacation in the office of Chief Justice of the Common-Bench; Queen *Mary* granted the office of the *Exigenter* of *London*: resolved, that the next Chief Justice shall avoid it, for 'twas incident to his office.

Also in a'l Writs directed to the Sheriff concerning the County Court, the King saies, *in comitatu tuo*; and in return of exigents made by him, he saies, *ad comitatum meum* tenet. &c. and the style of the Court proves it; and by the statute of 33 H. 8. *The Sheriff of Denbigh shall keep his shire-Court at &c.* In a false judgement 'tis said, *in pleno com. tuo recordari facias*, &c. And in a precept of Tolt. 'tis said, *Summoneas*, &c. *quod sit ad comitatum meum*. And it should be very inconvenient that another should have the custody of the entries and Rolls of Court, which may be imbecilled, and the Sheriff responsible for them. And it was resolved, that the custody of all the Gaols within every County belongs to the Sheriff by right, and are annexed and incident by the Law to the Sheriffs office, *vid. stat. An. 14 E. 3. ca. 10.*

Bozons Case, 26 & 27 of the Queen. fo. 34.

A Portion of tythes in *L.* appertained to the Rectory of *G.* which was presentable, and the Queen was seized of the Rectory of *L. jure corona*, which was appropriated to the Monastery of *W.* and grants to *B. ex gratia speciali*, &c. *totam illam portionem decimarum*, &c. in *L.* &c. *cum omnibus aliis decimis suis quibuscumq;* in *L. tunc, vel nuper, in occupatione*, I. C. & that the Patents shall be of force, *non obstante aliquibus defectibus in non nominando, male recitando*, &c. *alicujus occupatoris*. And I. C. had never any Tythes in *L.*

Resolved, That (in the occupation of I. C.) refer

to all the sentence, and not only to (*cum omnibus aliis decimis, &c.*) 1. Because (*illam*) demonstrates fully, that there ought to be words subsequent, to explain and reduce in certainty that portion by the intention of the Queen should pass, *viz.* that which was in the occupation of I. C. and 'tis not satisfied till it be come to the full end of the sentence. 2. This conjunction (*cum omnibus aliis, &c.*) couples the last words to the former, and makes the words subsequent to refer to all the sentence. 3. If all the tithes in L. of the said Rectory should pass, the addition of the occupation of I. C. should be vain, & *Maledicta expositio, &c.*

Resolved, That by grant of *portionem decimarum, &c.* the tithes, parcel of the Rectory of L do not pass; for, (*portion*) properly signifies a part or portion in gross, divided, and not parcel of the Rectory: and the Queen had not any portion in gross, but all were parcel of the Rectory; And (*ex gratia speciali, &c.*) shall not extend by any strained construction, to make a thing pass against the intention of the Queen, expressed in her Grant, and against the apt, proper and usual signification of the words of his Grant.

Resolved, That because I. C. had not any tithes there, nothing passes: for, admit that a portion should be taken for a part, then the effect of the grant is, *totam illam portionem decimarum in occupatione I. C.* and in truth he never had any part: nothing without question passes, in case of a common person; *a fortiori*, not in the Case of the Queen. As to the point: When a clause of *Non obstante* shall make the grant of the Queen good, when not;

Resolved, When the King by the Common-law cannot in any manner make a grant, there a *Non obstante* of the Common-law will not make the grant good, against the reason of the Common-law; as the King

grants a *protection* in an assize, or *Quare impedit*, notwithstanding any Law to the contrary, tis void : for protection lies not in these Cases, for the loss which may come to the parties by such great delay, but when the King may lawfully make a Grant : but the Common Law requires, that he be so instructed that he be not deceived, there a *Non obstante* supplies it, and makes the Grant good. As the King having made a lease for life or years, grants the land, *Non obstante* that it be in lease for life, years, &c. Or if he grants the land, and further grants the reversion of it, depending upon an estate for life, years, &c. tis good. See the book at large.

Resolved, When the words are not sufficient, *ex vi termini*, to pass the thing granted, but the Grant is void ; there a *Non obstante* will not serve, as in the principal Case ; and the Patents were not holpen by 18 of the Queen, *ca. 2.* for Patents of Concealment are expressly excepted out of the Act.

Terringham's Case, 27 El. in Banco Regis, fo. 36.

Resolved, That prescription doth not make a thing appendant, except the thing which is appendant agree in quality and nature to the thing unto which it should be appendant, as a thing incorporate, as an advowson to a thing corporate, as a Mannor, or as a thing corporate as lands to a thing incorporate as an office, these may be appendant : but every thing incorporate may not be appendant to a thing corporate ; as common of turbary may not be appendant to land, but to a Messuage or House, as it is holden 5 *Ass. 9.* for the thing which is appendant ought to accord with the nature and quality of the thing to which it is appendant ; and Turves ought to be expended in a Mannor.

The

The commencement of common appendant by the ancient Law was in this manner; viz. When a Lord of a Mannor infeoffed another of arrable lands to hold of him in Soccage, (*id est*) *per servicium socæ*, the Feoffee *ad manutenend. servicium socæ* had common in the waists of the Lord for his necessary beasts that did plow & arre his lands, and this Common is of common right, and commenceth by operation of the Law, and in favour of tillage, and therefore it needeth not to prescribe in that, for so it is holden 4 H. 6. & 22 H. 6. as one ought if it were against common right. But it is only appendant to the ancient arrable lands, and only for Oxen, Horses, Kyne and Sheep, &c. And because it is against the nature of common appendant to be appendant and meadow or pasture: and because that here, the prescription was to have common time out of mind to a house, meadow and pasture, as well as to arrable, by which it appears to the Court, that there hath been a house, meadow and pasture, time out of mind; 'twas resolved, that this Common was appurtenant, not appendant. But if of later times, men have builded upon some part of such arrable lands, and some part thereof is imployed to a meadow and pasture, and this for maintenance of tillage (the original cause of common) the Common remains appendant; and it shall be intended in respect of the continual usage of the Common for beasts levant and couchant upon such land, that at the beginning all was arrable. But in pleading he ought to prescribe that the same is appendant to land: for though *terra dicitur à terendo, quia romere teritur*, yet *terra* includes all, and is arrable, though converted to meadow, &c For it may be plowed.

A man may prescribe to have common appendant to his Mannor, for all the demeans shall be intended

arrable; at least, in construction of Law (*redd. singula singulis*) it shall be appendant to such demesns which are ancient arrable, &c. And when a man claims common appendant to his Mannor, no incongruity appears of his own shewing, as here. So, Common may be appendant to a Carve of land, which may contain pasture, meadow, and wood: but it shall be applyed to that, which agrees with the nature of the Common.

Resolved, That common appendant may be appor- tioned, because tis of common right; for if a Com- moner purchase part of the lands, in which he hath common; yet the Common shall be apporportioned, as well as if the Lord purchase parcel, if of the Tenancy the rent shall be apporportioned. And if A. a Commo- ner enfeoff B. of parcel of his ancient lands, the Com- mon shall be apporportioned, and B. shall have common *pro rata*. And 'twas agreed, that such common which is admeasurab'e, remains after severance of part of the land, to which, &c. But here, for that the Com- mon was appurtenant, 'twas adjudged, that by the purchase all was extinct, for 'twas against common right; for, by the act of the parties, it cannot be in esse for part, and extinct for part.

'Twas said that *Pertinens* is the Latin word, as well for Appurtenant as Appendant, and therefore *subiecta materia*, and the circumstances, ought to direct the Court to adjudge the Common, appurtenant or ap- pendant.

Resolved, That unity of possession of the intire land, to which, &c. and of the intire land in which, &c. extinguisheth the common appendant. By *Wray*, Chief Justice, common for vicinage, is not appendant; but for that it ought to be by prescription, 'tis resembled to common appendant, but common appurtenant, or in gross, may commence at this day by grant, or prescrip-

prescription; and by him, the one may inclose common for vicinage against the other, as hath been adjudged in *Smith and Redmans Case*: Resolved, that a man may chase out beasts that do him trespass, with a small dog, and shall not be compelled to distrain them damage feasant.

Cases of Appeals and Indictments,

Brookes Case, 28 of the Queen, fo. 39.

Resolved, That in appeal of Burglary, 'twas an insufficient count that the Defendant *domum, &c. felonice & burgaliter fregit*, for it ought to be *burglariter* or *burgulariter*, which is *vox artis*, as *murdravit*, *rapiuit*, which cannot be otherwise expressed.

Resolved, If the count had been sufficient, he being convicted once, should not be again impeached, but here he was discharged upon the insufficient count. By *Wray* Chief Justice, if upon accident, a man and all his family are out of the House, and one in the interim breaks the House, and commits felony, 'tis burglary; for the indictment is, *domum mansionalem fregit*, and so 'twas resolved 38 of the Queen, where a man hath two Mansion-houses, and servants in both, and in the night when the servants are out, &c. the house is broken, 'tis burglary.

Wetherell and Darlyes Case, 35 of the Queen, fo. 40.

In an appeal of murder, the Defendant was found guilty of homicide, and had his Clergy, after indicted, and arraigned for murder, pleaded this conviction; Resolved, that 'tis a good bar at Common Law, and restrained by no statute; the reason is, be-

cause the life of a man shall not be brought twice in question for the same offence.

Yonggs Case, 38 of the Queen, fol. 40.

AN Indictment, that *dedit unam plagam mortalem circiter pectus*, is sufficient; for 'tis incertain whether it be in the neck, arm, or belly; and indictments ought to be certain, and shew in what part the wound is, and the profundity and latitude, that it may appear to the Court to be mortal, and one of the wounds incertainly alledged, makes the whole Indictment insufficient. 'Twas said, that the Indictment ought to have been, that if the party had not died of the first stroke, that he died of the other, and this is the common course.

Upon a suddain Affray; if the Constable or any of his assistants in suppressing it, be kill'd, 'tis murder in Law, though the murderer knew not the party killed, for the Law adjudges it murder, and that he had malice prepense, for that he opposed him against Justice; So, in case of a Sheriff, or any of his Bayliffs or Officers in execution of process; so, of a Watchman.

Walkers Case, 41 of the Queen, fo. 41.

RESOLVED, That an Indictment of murder (upon which the party was outlawed) that he struck the dead in *sinistra parte ventris circa umbilicum*, was good: for *sinistra parte* was sufficient, and the other superfluous: but in *Yonggs* before; there was no certainty before the *Circiter*.

Heydons Case, 28 of the Queen, fo. 41.

EXCEPTIONS to the Indictment, 1. Because 'twas taken before B. *Coronatore in com. prad.* and doth
not

not say *de com. præd.* Resolved, it shall be so taken by reasonable intendment, and the Writ *de coronatore eligendo*, is, *quia A. B. nuper unus Coronator. in com. tuo, diem clausit. &c.* and so 'tis taken in *Willoughbyes Case in Ploydon*. 2 Because he doth not say, that *E. S.* (dead) *fuit in pace Dei, & dominæ reginæ*. Resolved: that they are only words of form, to amplify the hainousness of the offence, not of substance, & perchance he was not in peace. 1. Because he doth not say, *felonice*, nor *ex malitia sua præcogitata dedit*, &c. Resolv. that the word (*et*) couples the sentences together, so that these words (*felonice & ex malitia, &c.*) first spoken refers to all the subsequent words, &c. and *tunc & ibidem* makes it clear. 4. The profundity of the wound is not shewn; Resolved, It cannot be here; for all the pan of the knee was cut off. 5. 'Tis said, *tempore felonie præd. & muredredi*, where it should be *murdri*: resolved the first words were sufficient; and then *muredredum* being a word insensible, is superfluous, and shall not hurt. 6. The wound was the fourth of *August*, the death the nineteenth of *December*, and the indictment is, that *T. M. &c. tempore felonie & muredredi præd. viz. 4. Augusti, felonice fuer. presentes & auxiliantes, &c.* 'Twas objected, that the death hath relation to the stroke; Resolved, that indictments have been often adjudged insufficient, when the stroke is one day, the death another, and the Jury conclude the death to be done the first day; But here it ought to have been, that they were *presentes & auxiliantes, &c. ad feloniam & mured. præd.* and relation which is a fiction, shall make no man a felon. And *Wray* said, that without question, the year of bringing the Appeal, shall be accounted from the death, not from the stroke.

Hume against Ogle, 32 and 33 of the Queen, fo. 42.

ADjudged, that the Count (that the defendant gave the stroke the 27 of September at D. in the County of N. and that her Husband of the same stroke at D, &c. died, and so the same Defendant murdered him at D. aforesaid) 'twas repugnant and insufficient; for, as it cannot be said, that he murdered him the first day (as Heydons case is before) so neither at the place where the stroke was, but where he died.

Hudson and Leen Case, 31 of the Queen, fo. 43.

IN an appeal, H. counted that the Defendant, &c. felonice maimed him in his left hand, the Defendant pleaded, that before &c. The Plaintiff recovered in Trespass for the same battery and wounding 200l. and satisfaction acknowledged. Resolved, that the bar is good: for where the Plaintiff is to recover damage only (as in this Case of appeal) he shall not be twice satisfied for the same thing, *Nemo debet bis puniri pro uno delicto*. And here the wounding in the first action includes the Mayhem, and more, and the Defendant hath averred that the wounding in the first action, and the Mayhem here is one.

Syers Case, 32 of the Queen, fo. 43.

RESolved, If the principal be pardoned, or hath his Clergy, the accessory cannot be arraigned, for 'tis a Maxim, *ubi factum nullum, ibi fortia nulla, & ubi non est principalis, non potest esse accessarius*, and none can be principal before it be so adjudged by Law, viz. by judgement upon verdict, or confession, or by Outlawry; and it suffices, not that in truth, he be principal;

cipal; and the acceptance of pardon, or prayer of Clergy, is an argument, but no judgement in Law that he is guilty. But, if the principal, after attainer be pardoned, or hath his Clergy, the accessory shall be arraigned, for it appears judicially that there was a principal.

Bibithes Case, 39 of the Queen, fo. 34.

RESolved, That where the principal was found guilty of man-slaughter, and not guilty of murder, and had his Clergy, the accessory shall be discharged, for till judgement, it doth not appear judicially that there was a principal. So if the principal upon his arraignment confesses the felony, and before judgement obtains pardon, or hath Clergy, Resolved that there cannot be an Accessory before the fact, in man-slaughter, for 'tis upon a suddain affray; and if premeditated. 'tis murder.

Vauxes Case, 30 of the Queen, fo. 44.

RESolved, That where a man was indicted for poysoning another, perswading him that the potion mixt with Cantharides should cause him to have issue by his wife, the indictment (*nesciens præd. potum cum veneno fore mixtum, sed fidem adhibens præd. persuasione dict. w. V. recipit, & bibit*) was sufficient; for, 'tis not expressed that he received the poyson, for (*venenum præd.*) wants, and the words after (*immediate post receptionem veneni præd.*) are not sufficient to maintain an indictment, which ought to be certain, and not by implication.

Resolved, That *Vaux*, who perswaded, was a principal murderer. though he was not present at the receipt of the poyson; and here he cannot be accessory, for

for there is no principal ; and if any one had procured V. to do it, he had been accessory before ; which note, a special Case, where Principal and Accessory both are absent at the time of the felony.

Resolved, That (*auter foits acquite*) here is no plea ; for, he was discharged upon an arraignment upon this insufficient indictment ; and the former acquittal or conviction, ought to be lawful : and the Maxim is, That the life of a man shall not be twice in jeopardy, for one offence, but here his wife was not in jeopardy. So, if a man be convicted by verdict, or confession, upon an insufficient indictment, and no judgement given, he may be again indicted and arraigned, for the Law wants its end ; but, if upon such insufficient indictment, the Felon hath judgement *quod suspendatur per collum*, and so attainted (which is the end of the Law) he cannot be indicted again, &c. till this judgement be reversed ; and upon such acquittal no conspiracy lies.

Wrote and Wiggs Case, 33 of the Queen, fo. 45.

THe Defendant in an appeal of murder, pleads that *auter foits*, by inquisition taken before the Coroner of the Queens Household, and B. one of the Coronors of M. he was indicted of man-slaughter, which inquisition was certified to N. at the Gaol delivery ; and the Defendant upon this was arraigned, confessed the felony, and had his Clergy, and it appears the arraignment, &c. was after the purchase of the writ of appeal, and before the return.

Resolved, That *auter foits* convict of man-slaughter and Clergy, is a good bar in an appeal of murder, as 'twas adjudged in *Holcrofts Case*. In which it was likewise resolved, that an inquisition taken before B. Coroner of the Household, &c. and one of the Coronors

nors of *M.* is well taken, and within the statute of *articuli super chartas* ; though the statute requires two persons : for the intent of the Act was performed, and the mischief recited avoided : for though the Court removes, yet, he may proceed as Coronor of the County.

Resolved also upon the statute of 3 *H. 7. ca. 1.* that this Case was out of the statute; for, if the Defendant had his Clergy, the appeal lies not, *à fortiori* when he is convicted only, and prayes his Clergy ; and the act of the Court to be advised as to the allowance of Clergy, (so the Case was) shall not prejudice the party in case of life : and 'twas resolved, that attaint of murder in the act, extends to a person convicted by confession, or verdict, as to a person attaint, for he which is attained, is convicted and more. And *Agnes Gainfords Case* adjudged, that where 3 *H. 7.* is, *That the wife, or heir of him so slain shall have appeal*, that the Heir of a Woman, &c. shall have it against him, who was acquitted of the same murder. So resolved here, an indictment and conviction, or acquittance of Man-slaughter, is a bar to an indictment of the same death ; for all is the same felony, though the circumstance alter it.

Resolved, That at Common Law, the Coronor of the household had an exempt jurisdiction within the Verge, and the Coronor of the County could not meddle, as appears by *Articuli super chartas* ; and *Smifis Case* adjudged, where a Coronor of the County took an inquisition within the Verge, 'twas avoided by plea, the one cannot meddle within the power of the other. Put Justices of the Kings Bench, *of oyer and terminer*, &c. may inquire, hear, and determine all murders, &c. within the Verge, for their authority is general through all the County : so resolved in *Holcrofts Case*.

Re -

Resolved, That the Indictment was sufficient, for it doth not appear that *D.* (where the stroke and death was) was within the Verge; and though in truth it were within, yet it ought to be found by the oath of the Indictors, and cannot be supplied by nude averment; and it shall not be void *& coram non iudice*, as to the Coroner of the Household, and good before the Coroner of the Country; for the Record is intire, and taken intirely before them &c. And the Defendant in his Plea had averred, that *D.* was within the Verge, so the Coroner of the Country could not take the indictment only.

Resolved, For that the Indictment (upon which he was convicted) was insufficient, that he may be newly indicted, &c. for his life never was in jeopardy. Resolved, that where the stroke was one day, the death another, the conclusion ought to be, that he was murdered the day of his death, otherwise 'tis naught, for 'twas not murder before: and 'twas resolved, that the finding of the stroke and the death, were not sufficient of it self, without conclusion; and so *T. W.* murdered the said *R. W.* Resolved, that though the conviction were pending the appeal, yet it had been lawful, and before that the Defendant was compelled to plead, it had been a good bar.

Waits Case, 45 of the Queen, fo. 47.

RESolved, That where a Woman brought seven several appeals against several Persons, as principals, all ought to abate: but the first, for all the principals and the accessories before the murder and after, and before the Writ purchased, against whom the Plaintiff will bring an appeal, ought to be named in the Writ: for all make default, except one; yet, the

the Plaintiff ought to count against all, therefore he ought to bring the appeal against all : And the Defendant shall not have damages by the statute of *W.* 2. For it is out of it, because the Writ abated. And the statute of *Magna Charta* sayes (*appellum*) in the singular number.

H W's Case, 30 of the Queen, fo. 48.

AN Indictment upon 8 *H.6.* was quashed, *Quia fuit inquisi io capta ad sessionem pacis in Com.S.tent. die Martis, & die Mercurii* ; though the Sessions may endure two or three days, yet the Record ought to mention, that they were holden at a day certain : as also, for that the statute was mis-recited in a point material. *Note*, because mis-recital is fatal ; the sure way is, to draw the indictment with conclusion *contra formam statuti*, and with no recital of the Act.

Oguel's Case, 29 of the Queen, fo. 48.

AN Executor possessed of a Grange, consisting of divers parcels, demises all the Grange (except *H.*) to *A.* for 23 yeares, and *H.* to *F.* for 23 yeares, and grants all the residue of the term in his intire Grange to *A.* and *F. B.* the reversion, or grants a rent-charge in fee, out of all his lands, &c. called *C. Grange quondam in tenura B* (the Testator) and now *in tenura & occupatione de A.* The rent is arrear, the entire term expires, the Reversioner makes a Feoffment, the Grantee dies, the Feoffee leases at will, the Executor distreins for Arrerages..

Resolved, That at Common Law, in some case debts for arrerages of an annuity in fee, though it continues ; as if a Parson, or Prebend resigns, or dies, because the Parson is chargeable ; otherwise of a rent-fer-

service, charge, or seck, when the free-hold continues; and for a rent there is a diversity, when a rent in fee is extinct by the act of the party, and when of the Law, and when particular estates expire; see the book at large. But 'twas resolved in the case at bar, that the arrerages due in the life of the Grantee, were lost at Common Law. Resolved, that H. was not charged with the rent, for though it be parcel of the Grange, and A. and F. have the reversion of the terms and so it may be said in their tenure; yet, for that A. then had not H. in his occupation, 'tis not charged.

Resolved, That the Lessee at will is chargeable by 32 H. 8. ca. 37. for where things are due in right, and become remediless by the act of God, the Parliament which gives remedy for this, shall be favourably construed, and extend to advance the remedy proportionably to the defect of the Law, according to the mind of the makers, and therefore the feoffee of the feoffee *in infinitum* shall be charged, for otherwise the statute shall be in vain, &c.

Resolved, If the Grantee in fee, or for life of a rent-service or charge, (after 'tis arrear) grants over, the Tenant attorns, the Grantor dies, his Executors are not within the statute, for by the Grant the arrerages are lost, and were not due to the Testator *tempore mortis*, as the statute speaks; and after the grant the Testator could not distrein for the arrerages; and the act gives remedy only where the arrerages are due, and become remediless by the act of God.

Sharp and Pools Case, 17 of the Queen. A rent was granted to a Woman for life, 'tis arrear, she takes Husband, 'tis arrear, the Wife dies, the Husband brings debt against the Heir being terre-tenant for all arrerages; Resolved, that for the arrerages before the marriage he had no remedy at Common Law, but for the other he had debt.

Object.

Objected, that the Husband shall not have the Arrearages due before by the statute. 1. Because at common Law the Executors of the wife may have an action for them, and the Statute gives remedy, when executors cannot have an action, and doth not intend to toll the remedy from the common Law: 2. The branch sayes (*due in the wives life*) so the arrearages ought to incurr, when she is his wife. Resolved to the contrary, for the statute sayes (*due and unpaid in the wives life*) and the common Law gives remedy for the arrearages of an estate for life incurred in the life of the wife, and therefore the statute did not intend to extend to these arrearages, but to the arrearages due before; for, *verba accipienda sunt cum effectu*.
 Resolv. That a Feme-covert cannot make an executor without assent of her Husband, and the administration of her goods of right belongs to the Husband. And the statute in naming the woman (*wife*) intends only to describe and design the condition of the woman, not to imply that the arrearages ought to incurr during coverture.

Rawlins Case, 29 and 30 of the Queen, fol. 52.

A. Possessed of a House for thirty years (except a Stable, of which B. was possessed for two years) granted all his interest to C. and demised the Stable to B. for six years by Indenture after the end of the two years; C. redemises all to A. for twenty one years, rendring twenty pounds *per annum*, and to pay a fine of twenty five pounds, upon condition for to re-enter for non-payment of the rent, or fine; before the day of payment, A. redemises the Stable to C. for ten years, the rent was behind, the fine was not paid, C. enters not into the Stable, nor B. attorns.

L

Resolv.

Resolv. That where the verdict was entered three terms past, and in the Roll the demise to B. for six years was not entered to be by Indenture, that the Roll shall be mended, because the note of the special verdict, which the Jury exhibited to the Court, remaining with the Secondary, purports that the Jury found the demise *promt*; by which it doth appear to the Court, that the demise was shewn in evidence, and reference made by the note to it; and so 'twas in *Gomersalls Case*.

Resolv. Though the condition is of two parts in the dis-junctive, for non-payment of rent, or of the sum in gross; yet, if A. had redemised any part of the house to C. and C. enters, by which the rent is suspended, that all the condition, as well for the collateral sum, as for the rent, is also suspended, because the condition is intire, and cannot be divided by the act of the parties. Resolv. That if A. had redemised any part to C. though C. never enters, the rent is suspended, and though a stranger occupy it.

Resolv. That the lease by A. to B. for six years, though he had nothing at the time, was good by conclusion by the Indenture; and when C. redemised all to A. then was the interest bound with this conclusion; then when A. redemises to C. the Staple, C. is also concluded, for all parties or privies in estate or interest, are bound by the Estoppel; then the Case is no other, but that A. demises for six years the Staple to B. and after demises to C. for twenty years (which is a good Lease in reversion for fourteen years) this is no suspension of the rent, or condition; for 'tis no grant of the reversion, but a future interest in reversion; no term, but an interest of a term, as the pleading is, and notwithstanding such grant, the reversion is in the grantor, without attornment, and he shall have the rent upon the first lease,

lease; but if there be an attornment, the reversion passes, and suspension will follow. And therefore it was agreed, if a man leases for twenty one years rendring rent, and a re-entry, the Lessee leases to the Lessor for six years, to commence two years after, the rent is arrear; and by this he shall defeat the future interest vested in him.

Resolv. That this Estoppel being found by verdict, the Court ought to judge upon all the special matter, according to Law; and because they are sworn *ad veritatem dicendam*, they did well to find the truth of the Case, and leave it to the Court; by *Wray* Chief Justice in *Pledals Case*, the Jury was attainted for not finding such a lease by conclusion, intending that they (being sworn *ad veritatem dicendam*.) were not bound to find it; for the Court held, that the interest of the land as to the parties and privies was bound, and no conclusion shall be by such Indenture, after the term ended, by *Wray*.

Resolv. If Lessee for twenty years, leases for two years rendring rent, and grants all his term and interest; if the Lessee attorns, the reversion passes; and if no attornment be, yet the interest in reversion passes; for the grant of a man shall not be adjudged void, if, to any intent, it may take effect.

Resolv. If Lessee for twenty years of a house, leases part for two years, and after leases to another all for ten years, rendring rent, so that it inures as a lease in reversion for part, that the rent shall issue out of all, and of the interest of the term, though it be not any estate that may be surrendered, and though it be conjoynd with land in possession.

Error was brought upon this judgment, and this error assigned; for that R. the Plaintiff was an Infant, and was admitted by his Guardian, and no record made of it, as 'tis used in *Banco*, but only recited

red in the Court, *J. R. per A.B. gardianum suum (ad hoc per curiam specialiter admissum) queritur*, which was disallowed by all the Justices, upon search and view of many presidents, which make a Law in this Court, yet some presidents were as *in Banco*.

Note (*Rader*) according to the opinion of *Wray* 'twas resolved in *Londons case*, that if a man takes a lease by Indenture, of his own land, this is an Estoppel but during the term, and then both parts of the Indenture belong to the lessor.

Warden and Commonalty of Sadlers Case, 30 of the *Queen*, fol. 54.

BY *Mandamus* 'twas found before B. Mayor of London, Escheator of the City, and the inquisition was returned in Chancery, that T. C. held of the King, &c. and dyed seised without Heir; the Wardens, &c. shewed their right that R. M. was seised in fee, and devised to them in fee; and that they were seised till by C. disseised, and shew the custom of London, that a Citizen and Freeman may devise in Mortmain, and averred that R. M. was, &c. *tempore mortis*; and upon this, great question was, Whether a *Monstrans de droit* lyes, or ought to be by Petition. See the Case at large for this Learning, *Bereblock* and *Redes Case* was cited to be adjudged, if A. be bound in a Recognizance, Statute, &c. and after a Recovery in debt was had against him, and he dyes, his Executors ought first to pay the debt upon the Recovery, though it be puny to the Statute, &c. for though both be Records, yet the judgment in the Court upon judicial and ordinary proceeding, is more notorious, and conspicuous, and of more high and eminent degree than a Statute, &c. taken in private, by the consent of Parties.

Forse and Hemblings Case, 37 Eliz. in com. Banco, fol. 60.

Alice Allen seised of certain Messuages in fee, maketh her Will in writing, and thereby demisseth, that if *James Amynd* doth survive her, that then she doth demise, and bequeatheth the same messuage to him and his Heirs. And afterwards the said Alice did intermarry with the said *James*, and during her Coverture she said often, her said *James* should never have the said Messuage by the said Will; Alice dyed without issue, and *James* survived, and the question was, Whether the Will was countermanded by the said Marriage, or not; and if not, Whether by the words of revocation after the Marriage, was a Countermand, and it was adjudged upon great deliberation, that the taking of a Husband, and the coverture at the time of her death, was a Countermand of the Will. For the making of a Will is but an inception thereof, and it doth not take any effect until the death of the devisor. For, *Omne testamentum morte consummatum, & voluntas est ambulatoria usque extremum vite exitum.* And it should be against the nature of a Will, to be so absolute, that he that made the same, being of sane memory, may not countermand the same. And therefore the taking of her Husband, being her own proper act, doth amount to a Countermand in Law: Also 'twas said, that after Marriage all the Will of the Wife in judgment of Law, is subject to the Will of her Husband, and a Feme-Covert hath no Wills, and therefore the Countermand after Marriage was, of no force, *quod fuit concessum per tot. Cur.*

Harlakendens Case, 31 El. in Banco Regis, fol. 62.

THE Earl of Oxford leased to A. B. and C. (except the Trees) for 21 years, C. assigned to D. the Earl sells the Trees to A. B. and D. they lease to E. and after sell the Trees, the Vendee cuts them, the Lessee brings trespass. When a man maketh a lease for life or years, the Lessee hath but only a special interest or property in the Trees being Timber, as things annexed to the land; but if the Lessee, or another, severs them, the property and interest of the Lessee is determined, and the Lessor may take them, as things which were parcel of his Inheritance.

It was also resolved, that this clause (without impeachment of waste) doth not give to the Tenant for life, any greater interest in the Trees, than he had by the demise of the Land, but only that it will serve, that he shall not be impeached in any action of Waste, or to recover damages, or the place wasted.

This is adjudged otherwise by all the Judges of England in Lewes Bowels Case in the 11 Report.

* It was also resolved, that if an house fall by tempest, or other act of God, the Lessee for life or years hath a special interest to take timber to re-edifie the same, if he will. But if the Lessee suffer the house to fall, or take it down, the Lessor may take his timber as parcel of his Inheritance, and the interest of the Lessee is determined, and he may have waste, and treble damages.

Resolv. That the Lessee by the grant had an absolute property in the Trees, so that by the lease of the land, they did not pass, and he hath not equal ownership in both; and it should be a prejudice to him

him, if they should be joyned to the land, for then he could not cut, during the term, without waste, and after he shall not have them, and the Lessor shall not have them against his own act. And here A. B. and D. were tenants in common of the land, and joyn-tenants of the trees, and so their interest of several qualities, and therefore cannot be an union between them, but upon a feoffment, if the Feoffor accept the trees, they are in property divided, though, *in facto*, they remain annexed to the land, for it is not felony to cut them, &c. and if the Feoffor grant them to the Feoffee, they are re-united in property, as well as *de facto* and the Heir shall have them, not the Executors; for the Feoffee hath an absolute ownership in both, and it is more benefit to him that they are re-united.

It was resolved, That if timber-trees be blown down with the wind, the Lessor shall have them, for they are parcel of his Inheritance, and not the tenants for life, or years; but if they be Dotards without any timber in them, the tenant shall have them.

It was adjudged, that waste may be committed in glass in the Windows, for it is parcel of the house, and descends as parcel of the Inheritance to the Heir, and the Executors shall not have them, although the Lessee put the glass in the Windows at his own cost, and if he take them away, he shall be punished in waste. And 42 Eliz. in Com. Banco, It was resolved, that Wainscot, whether it be annexed to the house by the Lessor, or the Lessee, is parcel of the house, and there is no difference in Law, whether it be fixed with great Nails, or little Nails, or Screws or Irons put through the Walls; for if it be fixed by any waies or means to the house, or posts, or walls thereof, the Lessee may not remove it, but

he is punishable in an action of waste. For it is parcel of the House, and by lease or grant of the house in the same Mannor (as Sieiling or Plaistering) it shall pass as parcel thereof.

Fulwoods Case, 35 of the Queen, fol. 64.

C. Acknowledged a recognizance of 250*l.* to the Chamberlain of *London*, and his Successors, after acknowledges a statute of 200*l.* before the Recorder of *London*, and Mayor of the Staple to A. after A. sues execution by *Liberate*, but it doth not appear that it was ever returned; after, the Successors of the Chamberlain, sue execution, by precept to the Serjeant of the Mace in nature of an *Elegit*, and hath a Moyety, C. dyes, his Wife recovers Dower, and hath her house assigned for her third part, she dyes, the Chamberlain assigns to *Fulwood*, after A. assigns also to F. after the Heir of C. demises to B. &c.

Resolv. That the Successors of the Chamberlain shall have this recognizance, though a Body sole; for that the Corporation was by custom to divers purposes, for Orphanage, for the Recognizance was acknowledged for Orphanage-money, and the same custom inables the Successors to take such an Obligation, &c. otherwise of a Bishop, Parson, &c. and that the Execution by the Serjeant of the Mace, was good, notwithstanding the statute of *W. 2. cap. 18.* which saith, *Vic' liberet ei medietatem, &c.* by reasonable extent, to wit, by inquisition of honest men, and the Sheriff is sworn, and the Serjeant is not sworn to take the Jury, &c. For the statute extends to every other immediate officer, to any Court of the King of Record, &c. Resolv. That execution of the *Elegit* was good enough, without suing a

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Scire facias against A. being in by matter of Record; but 'twas said, if the Sheriff had returned the former execution, he ought to have a *Scire facias*, by the Court, if the Sheriff makes execution, 'tis good.

Resolv. That the Verdict was good, which finds that C. acknowledged a recognizance before the Mayor, though not said *secundum formam statuti*, nor *per scriptum suum obligatorium*, for being the trover of lay-people, it shall be intended according to the statute. Resolv. That the Conusee cannot have aid of the statute of 32 H. 8. cap. 5. for which, see the Book at large.

Resolv. That if a man be bound in two statutes, and the latter statute be first extended, and delivered in execution for a longer time and a greater sum than the first was, yet when the first statute is satisfied, and his interest lawfully determined, the second Conusee shall have the Land again, by force of the first Extent. It was resolved *per tot. Cur.* that the Execution of a *Liberate* is good, although the Writ be not returned, and so of a *Capias ad satisfaciendum*, and an *Habere fac seisinam*, and other writs of Execution. And that the Conusee should hold the land, not only until he be satisfied for damages for detaining of the debt, and costs of sure, but also for his reasonable labours and expences, look the words of the execution; and being in by matter of Record, the Conusor must bring his *Scire facias*; but in case of an *Elegit*, the Conusor after satisfaction may enter, for there is no costs and damages, but the meer debt.

Hyndes Case, in Com. Banco, 33 Eliz. fo. 70.

William Harve seised of certain lands by deed indentured, demised the same to Robert Gerard

ward for 16 years, who assigned over to *Elizabeth Hynd*. *William Howe* afterwards by bargain and sale in consideration of money due, sold the reversion to one *Libb*, and before the same was inrolled, the said *William Howe* levied a fine to *Libb*, and his Heirs, &c. and after the levying of the fine, the said Indenture of bargain and sale was inrolled within six months, according to the form of the Statute, and *Elizabeth Hynd* the tenant did not attorn. The question was, Whether the Conusee of the fine after the said Indenture inrolled, shall be in by the fine, and by the bargain and sale? for if he shall be adjudged to be in by the fine, no action of waste lyeth, for default of attornment; and if he shall be in by the Indenture inrolled, then there needeth no attornment. And it was resolved, *per tot. Cur.* that when *Howe* by deed indented, did bargain and sell the reversion to *Libb*, and his Heirs; and before the inrollment levied a fine to *Libb*, and his Heirs, and after the deed is inrolled (within six months) that the Conusee shall be in by the fine, and not by the deed inrolled; for the fee-simple passeth by the fine to the Conusee, and his Heirs, and after the inrollment of the deed, may not divest and turn the estate out of himself, which was absolutely established in him by the fine; for when the common Law and the Statute Law concur, the common Law shall be preferred. And it is true, that the inrollment shall have relation to the delivery of the deed. But that is only to avoid estates, or charges made of the same thing by the bargainor, to strangers, after the delivery of the deed, and before the inrollment, but not to divest any estate lawfully settled in the interim, in the bargainee.

The Records are so high and sacred, that they import in themselves inviolable verity, which if any man

man dare to gain say, the Law doth attribute so great honour to them, that they shall be tryed only by themselves, and not by the Country; and if averment against a Record should be permitted, then the effect and validity of the Record should be tried by the Country, which is against the rule of the Law, *Nullo iniquum est in jure presumendum*. Yet, resolved in this Case, that the Lessee shall be admitted to averr, that the deed was inrolled, after the fine, and not before, because it stands with the record, and doth not impugn any thing within the record, and great inconvenience would follow, if such averment should not be admitted.

Boroughs Case, 38 Eliz. in Banco Regis, fol. 72.

Resolv. That the rent reserved upon a demise, ought to be demanded, if the Lessee will take advantage of a condition for non-payment of the same, and the demand to be made at the place limited for the payment of the rent, although there be no words of demand in the demise, and although it be out of the land demised, but in the Kings Case it is otherwise. *Prerogativa Regis*, for there the rent upon a re-entry reserved, ought to be rendred; and in such Case, the Patentee of the King shall demand the rent upon the land.

Resolv. If the Queen leases rendring rent, without limiting any place, or to whose hands, the Lessee may pay it at the Exchequer, or to the Bayliffs, or Receivers of the Queen; and when she so appoints it by expresse words, 'tis no more than the Law appointed; and though the words be (*Ad receptionem scacc. apud Westm.*) it needs not that the receipt be holden at *Westminster*, the Law would have implied that. And when a common person appoints

points to no place, the law appoints the payment upon the land.

Palmer's Case, 39 Eliz. in Banco Regis, fo. 74.

THE Sheriff by virtue of a *Fieri facias* may sell a lease of the Defendant, and in his writing the true commencement and term of the lease must be expressed, or else, if he selleth all the interest that the Defendant hath in his lands, he needeth not to make any mention in the return, but generally *quod fieri fecit de bonis & catallis, &c.* But an inquisition found that the Debtor of the King was possessed *pro termino quorundam annorum, &c.* 'twas void, for a term cannot be extended without shewing the certainty of the commencement; for after the debt satisfied, he is to have the remainder.

Resolv. For that the Case at Barr was an execution by *Elegit*, which ought to be made by inquisition; the sale here was void, for the term was mistaken in the inquisition, and so mistaken was apprised by the inquisition, and the Sheriff cannot sell any term, but that only which was apprised by the Jurors.

Hollands Case, 39 of the Queen, fol. 75.

RESolv. That before 21 H. 8. cap. 13. if he which had a benefice with cure, accept another with cure; the first is void, but this was no avoidance by the Common Law, but by constitution of the Pope, of which the Patron might take notice if he would, and present, without deprivation; but because the avoidance accrued by the Ecclesiastical law, no lapse incurred without notice, as upon a deprivation, or resignation; so that the Church was void

void for the benefit of the Patron, nor for his disadvantage; But now, if the first benefice be of the value of 8 *l. per annum*, the Patron at his peril ought to present, for to an avoidance by Parliament, every one is party, but if not of 8 *l.* 'tis void by the Ecclesiastical Law, of which he needs not take notice. Resolved, that 21 H. 8. is such a general act, of which the Judges *ex officio* (though it be not pleaded) ought to take notice. See the Book at large upon this Learning, what act shall be said a general act, of which the Judges are bound to take notice, what not.

The Case of Corporations, 40 and 41 of the Queen, fol. 77.

RESOLV. That where divers Cities, &c. are incorporated by the name of Mayor and Commonalty, Mayor and Burgessees, &c. and in the Charters 'tis prescribed that the Mayors, Bayliffs, &c. should be chosen by Commonalty and Burgessees, &c. which is as much as to say, as by all the Burgessees, or all the Commonalty; that yet the ancient and usual Election, by a certain selected number of the principal of the Commonalty, &c. (Commonly called the Common Council) and not by all of the Commonalty, or so many of them as will come to the Election, was good in Law, and warranted by their Charter; for, in every Charter they have power given to them to make Laws, Ordinances, and Constitutions, for the better government and ordering of their Cities and Boroughs: by force of which, and to avoid popular confusion, they, by their common assent, have instituted, &c. that the election shall be by such a select number. And though this Ordinance cannot be now shewn, yet it shall be

be presumed, that such ordinance and constitution was made at first.

Digbyes Case, 41 Eliz. fo. 78.

It was adjudged, that when a man hath a benefice with cure, above 8 l. and afterwards taketh another with cure, and is presented and instituted, and before induction procures the letters of dispensation, that this dispensation cometh too late: for by the institution, *Ecclesia plena & consultata existit*, against all persons but the King; for every rectory consisteth upon spirituality and temporality. And as to the spirituality, *viz. cura animarum*, he is compleat Parson by the institution; for when the Bishop upon examination had, admitteth him able; then he doth institute him, and saith, *Instituto te ad tale beneficium, & habere curam animarum*, of such a Parish, & *accipe curam tuam, &c.* Vide 33 H. 6 12. But touching the temporalities, as the Glebe-Lands, &c. he hath no free-hold in them, until induction; for by the general Council of Lateran, Anno Dom. 1215. it appeareth, that by the acceptance of two benefices, the first is void, *Aperto jure*; for upon this Council, are our Books in this Case founded. And 'twas resolved, that this was an acceptance of a benefice *cum cura*, within the Statute of 21 H. 8. Institution is an acceptance by our Law, and 'twas lately adjudged, that if before induction the *Clerk* be inducted to another, the first is void by 21 H. 8. which saith (*accept and take another*) and for that now the avoidance is declared by 21 H. 8. he is bound to take notice, but till after induction, &c.

Nokes Case, 31 Eliz. fol. 80.

A Man maketh a lease by these words (*viz.*) Demise, &c. Grant, &c. and covenants that the Lessee shall enjoy without eviction, by the Lessor, or any claiming under him, and was bound to perform all Covenants, &c. the Lessee assigns his term, a stranger enters upon the Assignee, and recovers in an *Ej. firme*, after ouster, the first Lessee brings Debt. This is a Covenant in Law, and the assignee shall have a writ of Covenant, 9 *Eliz.* 257. *Dyer*. And if a man be bound by obligation to perform all covenants, grants, &c. this doth extend as well to Covenants in Law, as to Covenants in Fact.

Resolv. Though the recovery were by verdict, yet he ought to shew that the Plaintiff in this recovery had an elder title, for otherwise the Covenant in Law is not broken. It was holden, that an expresse Covenant doth qualifie the 'generality of the Covenant in Law, and restraineth that by the mutual consent of both parties; but a warranty in Law, and an expresse warranty, the party may chuse whether he will have, for this word *Dedi* importeth a warranty.

Sir Andrew Corbets Case, 41 and 42 of the Queen, fol. 81.

A. Devises land to B. &c. to have, &c. till 800 *l.* shall be paid by them of the profits to marry his Daughters, and dyes; the Heir conceals the Will, takes all the profits, and dyes, the Will is found by office, the Devisee enters, and hath levied 640 *l.* and imployes it accordingly; whether the profits taken

ken by the Heir, shall be parcel of the 800 l. was the Question.

Resolv. That the words (shall be levied) shall be construed (shall or might be levied) and so 'twas holden of a lease or limitation of a use; otherwise, he which is to levy the summ by deferring to do it, may exclude the reversioner for ever: see the Book at large. Resolv. When the Heir or reversioner, &c. enters, and expulses him to whom the land is limited, he hath election to recover the Mesne profits, in an action, or re-entry, and retainer; till he levies the intire summ, and the other shall not have advantage of his own wrong, and if a stranger had entered, and occupied, the Devisee ought to have taken notice at his peril, for *vigilantibus & non, &c.* and none is bound to give notice, but here the Heir himself concealed the Will, and the Devisee had no remedy, for the Mesne profits after the death of the Heir. Resolv. That a Guardian shall not ouste Tenant for life, nor years of the Tenement.

Resolv. That admitting the Guardian shall ouste Tenant for years, yet he shall not hold over, because his term is certain in the commencement, continuance and end; otherwise Tenant by *Elegit*, Statute, &c. they shall hold over, because the term is uncertain.

Southcots Case, 43 Eliz in Banco Regis, fo. 83.

IF A. do deliver goods to B. for to keep, the goods be purloyned away, yer B. shall be charged in a Writ of Detinue. For, to keep, and to keep safely, is all one; but if B. do take them to keep as his own goods, he shall not be charged with them. And if A. do pledge or guage goods unto B. in this

this case B. shall not answer for them, if they be purloined, for he had some property in them, and not a custody only, but a Ferry-man, a common In-keeper, or a Cartier, which taketh hire, they ought to keep the goods safely. and they shall not be discharged, if they be stoln or purloined. But a Factor or a Servant (although they have wages) doing his endeavour, shall not be charged.

Luttrels Case, 43 Eliz. Banco Regis, fo. 86.

IF a man have Estovers, either by grant or prescription to his house, although he alter the Rooms and Chambers in his House; it seemeth that the alteration of the qualities, so as it be not of the house itself, and without making new Chimneys, by which no prejudice accrews to the owners of the Wood, is not any destruction of the prescription; and though he make new Chimneys, or make a new addition to his old house, he shall not lose the prescription thereby, but he may imploy or spend any of his new estovers in the Chimneys, or in that part newly added. It was also resolved, that if a House or Miln do fall, or be taken down by the act of the owner, or by wrong of another, yet for that the perdurable part which includes all, doth remain, which is the land, whereupon the Fabrick is built, he may re-edifie the same again without any loss of his appendant or appurtenant, but it ought to be upon the same place which was the foundation of the old House; for as it did support, and judgement of Law included the ancient House when it was standing: so it imports and includes the new House, so as it is in a manner a continuance of the ancient House.

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Mannor by fealty and fute to the Lords Miln, the Lord doth alien his Miln with the fute of his Tenants, and after, the Vendor dieth; and his sonne entereth and buildeth a new Miln upon the other parts of his demean, he shall have the fute to his own Miln, which the Vendee had before, for the fute belongeth to him that hath the Mannor, for no man may have fute to his Miln, by reason of a Tenure, if it be not of Corn growing upon the lands, within the Seigniorie or Mannor, and the Lord may erect a new Miln within any part of the Mannor, and the tenure is due to the same, and not to any particular Miln.

Draries Case, 43 Eliz. Error in banco regis, fo. 89.

A Countess being a Widdow retaineth three Chaplains: he who is last retained, is not capable of a dispensation, for the statute of 21 H. 8. c. 13. is executed by retaining of two, and the retaining of the third shall not divest the capacity, which was in the first two, but if the Retainer had been at one time, he who is first promoted, shall be first preferred, because in *de quatuor jure*, &c. 2. Resolved, If the two first die, the third is not capable of a dispensation without a new retainer, because he was retained at the Common Law, and not according to the statute, *Quod ab initio non valet*, &c. As if the son and heir of a Baron retaineth a Chaplain, and giveth him letters under his Seal, and after the Father dieth. And it was said, that the said act shall be taken strictly; as if a Baron be made Guardian of the five Ports, he shall retain no more Chaplains than before; and if a Baron retain two Chaplains who are promoted, he cannot discharge them, and retain others, during their lives.

Slades Case, 44 Eliz. fo. 92.

It was resolved, that every contract executory imports in it self an Assumpsit. For when one doth agree to pay money, or to deliver any thing, by that he doth assume, or promise to pay, or to deliver the things, and therefore when he selleth any goods to another, and agreeth to deliver them at a day to come, and the other in consideration thereof agreeth to pay so much money, at such a day; in this case both parties may have an action of Debt, or action upon the Case, upon the assumpsit, for the mutual executory agreement of both parties import in themselves as well a reciprocal action upon the Case, as an action of debt, and a recovery or bar in an action of debt, is a good bar in an action upon the Case, brought upon the same contract; and so likewise in an action upon the Case, a recovery, or bar in the same, is a good plea in an action of Debt, upon the same Contract.

The Defendant in an action of the Case upon the assumpsit may not wage his Law, as one may do in an action of debt.

If a sum of money be promised in Marriage to be paid at several dayes, an action upon the assumpsit lieth for non-payment of the first; although no action of debt lieth, until all the dayes be past, *Multitudo errantium non parit errori patrocinium*; and if the debtor of the King sueth by *Quo minus*, in the Exchequer, the Defendant shall not have this Law for the benefit of the King.

Mannor by fealty and sute to the Lords Miln, the Lord doth alien his Miln with the sute of his Tenants, and after, the Vendor dieth; and his Sonne entereth and buildeth a new Miln upon the other parts of his demean, he shall have the sute to his own Miln, which the Vendee had before, for the sute belongeth to him that hath the Mannor, for no man may have sute to his Miln, by reason of a Tenure, if it be not of Corn growing upon the lands, within the Seigniorie or Mannor, and the Lord may erect a new Miln within any part of the Mannor, and the tenure is due to the same, and not to any particular Miln.

Druries Case, 43 Eliz. Error in banco regis, fo. 89.

A Countess being a Widdow retaineth three Chaplains: he who is last retained, is not capable of a dispensation, for the statute of 21 H. 8. c. 13. is executed by retaining of two, and the retaining of the third shall not diversify the capacity, which was in the first two, but if the Retainer had been at one time, he who is first promoted, shall be first preferred, because in *de equali jure*, &c. 2. Resolved, If the two first die, the third is not capable of a dispensation without a new retainer, because he was retained at the Common Law, and not according to the statute, *Quod ab initio non valet*, &c. As if the son and heir of a Baron retaineth a Chaplain, and giveth him letters under his Seal, and after the Father dieth. And it was said, that the said act shall be taken strictly; as if a Baron be made Gardian of the five Ports, he shall retain no more Chaplains than before; and if a Baron retain two Chaplains who are promoted, he cannot discharge them, and retain others, during their lives.

Slades Case, 44 Eliz. fo. 92.

I T was resolved, that every contract executory imports in it self an Assumpsit. For when one doth agree to pay money, or to deliver any thing, by that he doth assume, or promise to pay, or to deliver the things, and therefore when he selleth any goods to another, and agreeth to deliver them at a day to come, and the other in consideration thereof agreeth to pay so much money, at such a day; in this case both parties may have an action of Debt, or action upon the Case, upon the assumpsit, for the mutual executory agreement of both parties import in themselves as well a reciprocal action upon the Case, as an action of debt, and a recovery or bar in an action of debt, is a good bar in an action upon the Case, brought upon the same contract; and so likewise in an action upon the Case, a recovery, or bar in the same, is a good plea in an action of Debt, upon the same Contract.

The Defendant in an action of the Case upon the assumpsit may not wage his Law, as one may do in an action of debt.

If a sum of money be promised in Marriage to be paid at several dayes, an action upon the assumpsit lieth for non-payment of the first; although no action of debt lieth, until all the dayes be past, *Multitudo errantium non parit errori patrocinium*; and if the debtor of the King sueth by *Quo minus*, in the Exchequer, the Defendant shall not have this Law for the benefit of the King.

*Adams and Lamberts Case; 44, and 45 Eliz. in Banco
Regis, in Ejectione firma, fo. 104.*

UPon consideration of the Statute of 1 E. 6. cap. 14. it was resolved.

1. That if one demise to any of his Kindred, to superstitious uses, although he limit them to pay certain sums of money to the said uses, yet these lands are given to the King; for it shall not be intended to be upon other consideration, but that which they at that time conceived to be the Service of God, which is the most worthy consideration; and the reason wherefore the demise was made to his friends was, because he imposed more trust in them than others, therefore the persons shall not be regarded.

2. A demise of an estate for life, or in tail is within the statute by equity, although that the statute saith, *To have continuance for ever*, for the intent of the statute was to toll such uses, and regardeth not the time of their continuance.

3. An estate-tail may continue for ever, and so was the intent of the deviser in this case, that the uses should continue for ever, for he limits his Heir to do it. 3. Without this construction the statute should be defrauded.

3. The statute giveth to the King, lands given for the finding of a Priest, and giving of lands upon condition to find a Priest is within the statute; for this is more compulsory than the other.

4. All the land is given to the King, but not by the first branch, for that extends only to lawful Chantryes, or those who have countenance of lawful commencement, but not to such who are without any colour of lawful Commencement: as if they

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Lib. 4. *Adams and Lamberts Case.* 165

were founded by license of the Pope, his Chantery is without colour of lawful commencement or foundation: also if lands be given to the finding of a Chantery without Corporation, this is out of the said branch. Neither by the second branch, for that giveth the lands belonging to such Colledges to the King, without which he shall only have the Scites; but by the third branch, for this extends to finding of a Priest without Corporation. But twas objected, that the land was not given to the finding of a Priest, for he had but a pension out of it: and the statute is, that the King shall have in as large, &c. as the Priest had it. 1. Here is a good use limited, six pence by the Week to six poor men, and although it be *Adendum*, &c. this is not within, for it is out of the statute, except that Orisons be to be performed in publique. For answer to these: these differences were taken 1. If one give 20 *l. per annum* for the finding of a Priest, and limit to the Priest 10 *l. per annum*, all is given to the King, for the residue shall be intended for the finding of necessaries: otherwise it is, if a condition be annexed to the gift, to give 10 *l. per annum* to a Priest, there the King shall have but 10 *l.*

2. Land of 20 *l. per annum* is given to find a Priest; with 10 *l.* thereof, and that the other tenne pound shall be to the poor, the King shall have but tenne pound: but if it be for finding a Priest, and maintenance of poor men, without limiting how much the Priest shall have, the King shall have the land: for otherwise he shall have nothing. 3. If land of 20 *l.* is given for finding salary for a Priest with 10 *l.* of it, and also a good use is limited, there the King shall have but ten pound, although the other necessaries are to be bound for the Priest, because a good use in certain shall be preferred before a superstitious

ous in certain use; but if nothing in certain be limited to the Priest, the King shall have the Land. 4. If land be given to find a Priest, the King shall have it, but if a Priest have but a stipend, the King shall have but the stipend. 5. When a certain sum is limited to a Priest, and other good uses are also limited, which depend upon the superstitious use, all is given to the King. 6. If all the uses be superstitious, of what certainty soever they are, the land is given to the King, otherwise it is, if there be any good use. And as to that which was objected, that the King shall have no more than the Priest; It was answered, that that extends to the 1, 2, and 4 branches, and not to the third, for otherwise the King should never have the land it self, for this was never used to be limited to the Priest himself.

And although that these Orisons are to be made out of any Church, yet it is within the statute, for the words, Church, or Chappel, extend to Lamps and Lights, and not to Prayers. 2. The statute speaks of Anniversary, &c. or other like thing, and this is a like thing: but in the Case at Bar, if he had said that his friends should have the residue of the profits of the land, this had saved the Land.

*Attorns Case, 45 Eliz. com. banco, in a
Quare impedit, fo. 117.*

A Noble Woman reteineth a Chaplain, who purchaseth a dispensation, she taketh a Husband, the Chaplain is promoted to another benefice than that which he had before the reteiner, his first benefice is not void.

It was objected, that the statute speaks of Dukes, &c. being Widdow, or married under the degree of a Baron, and for that, when she marieth a

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bove the degree she is out of the statute, and 'tis not sufficient she is within the statute, at the time of the retein, but she ought to be so also at the time of the promotion.

It was answered, that all which the statute requires at the time of the retein, is, that she be a Noble woman, married under the degree of a Baron, or a Widdow, and to be Noble at the time of the promotion; therefore a Noble Woman married above the degree, cannot retein, or if at the time of that promotion she be not able, as if her Earl be attainted. And although the Baron and Feme have but one body, yet they have two souls, wherefore it is not inconvenient that they should have several Chaplains, and the reason for which the said provision was made for a Noble Woman who marrieth an ignoble Husband, was not to exclude those who married Nobles, but because such Femmes are in Law ignoble (except they be Noble by descent) and without such provision shall be out of the statute: Baron reteineth a Chaplain and dieth, the Chaplain may retein both the benefices, but he shall be punished for non-residency, without suing a Non-obstante.

Dumports Case, 45 Eliz. Banco Regis in Trespass, fo. 119.

A Man maketh a Lease, provided that the Lessee or his assigns shall not alien the premises without special license of the Lessor, &c. The Lessor giveth license to the Lessee to alien the same, or any part thereof, &c. In this case the lessee may alien and his assigns, *Ad infinitum*, without any more license, and the proviso is determined.

The Lord Stafford made a lease to three persons, upon condition that they, nor any of them should alien without the consent of the Lessor, and after one of them did alien with his consent, and after the other two did alien without license; and it was adjudged 28 Eliz. that in this Case, the Condition being determined, as to one person by the license of the Lessor, it was determined in all: for when the Lessee alieneth any part of the residue, the lessor may not enter into any part aliened with license, and therefore the Condition being determined in part, is determined in all: for the Condition being intire may not be apportioned; and 16 Eliz. Dyer. 134. *fiat deny per Popham Chief Justice. Vide lit. 80. b. & 4 & 5. Ph. and M. Dyer 152.*

Bustards Case, 1 Jac. fol. 121.

IN every lawful exchange of land, this word *Ex-cambium* imports in it self Tacite, a Condition and a Warranty, and the other a Voucher and recompence, and in all respects of reciprocal consideration, th' one land being given in exchange for the other: but that is a special Warranty, for upon the Voucher he shall not recover other lands in value, but those only which were given in Exchange; and this Warranty follows only in privity, for none may vouch by force thereof, but the parties to the Exchange and their heirs, and no assigns.

If A. give in exchange three acres of land to B. for other three acres; and after one acre is evicted from B. in this Case all the exchange is defeated, and B. may enter into all his lands.

Beverleys Case, *de non compos mentis in Banco Regis.*

1 Jac. fol. 123.

EVERY Act that a man *De non compos mentis* doth either concern his Lands, Life, or Goods, either done in Court of Record, or out of Court of Record; all acts that he doth in any Court of Record either concerning his lands or goods, shall bind himself and all other for ever; and those acts which he doth out of the Court of Record, shall bind himself during life, and in some Cases shall bind all others for ever, so as the party himself shall not be admitted to stultifie himself or disable himself, but an ideot à *nativitate* may not make Feoffment, Gift, Lease, or Release, but it may be avoided during his life by office at the Kings sute, which shall have relation, à *tempore Nativitatis*, to avoid all acts done by him, and after his death the King shall deliver his lands *Rectis Hæredibus*: four manner of men, *de non compos mentis*. 1. An Ideot or fool naturally. 2. One which was of good and perfect memory, and by the visitation of God hath lost the same. 3. *Lunaticus, qui gaudet lucido intervallis*, who sometimes is of good and perfect memory; and some other times, *Non compos mentis*. 4. He that is so by his own act, as a Drunkard.

All acts, which a Lunatick during the time of his lunacy doth, and all acts which a mad man doth, who once was of perfect memory, and by the act of God hath lost his understanding, are equivalent to the act done by an Ideot; but the act which a man doth *Qui gaudet Lucidis intervallis*, at such times as he is of good and perfect memory shall bind him, and are good. And a Drunkard who for the time of his Drunkenness is *Non compos mentis*, yet his drunkenness

ness shall not extenuate his act or offence, but doth aggravate his offence, and doth not derogate from the act, which he doth, during the time of his drunkenness, and that as well touching his Life, Lands, and Goods, as any other thing that concerns him. The King shall have the custody of the Land, Goods, Chattels, &c. of one *non compos mentis*, to the use of him, his Wife, Children, and Family. A man *non compos mentis*, shall not lose his life for felony or murder, for no felony or murder can be committed, without a felonious intent and purpose, and he is deprived of reason, understanding, and intentions, *Diffa est fellonia, quia fieri debet felleo animo, & furiosus non intelligit quid agit, & animo & ratione caret, & non multum distat à brutis, as Bracton saith, Stultus dicitur à stupore.*

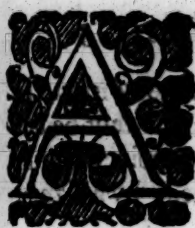
The End of the Fourth Book.

THE



THE FIFTH BOOK.

Claytons Case, 37 Eliz. in Com. Banco, fo. 1.



AN Indenture of demise dated 26 May, 25 Eliz. to hold for three years from henceforth, it was delivered at four a Clock in the afternoon, of the 20th. of June after. The Question was, when the Lease should begin, *from henceforth* shall be taken the day of the delivery *inclusive, id est*, from the making or delivery.

Traditio loci facit causam, this Lease must end the nineteenth of June, in the third year after. The day of the delivery is parcel of the term, but *à die confessionis*, or *die datus*, the term beginneth the day after the date: from the date, and from the day after the date is all one, because that in judgement of Law, the day includes all the day of the date, &c.

Elmers Case, 30 Eliz. Banco Regis, fo. 2.

RESolved, that the Statute of 1 El. is a private Act, whereof the Court shall not take notice, without pleading of it. 2. Whereas the Bishop ousted his Lessee for years, and made a lease for three lives, this is voidable by the Successor; for, first, the Statute giveth him power to make a lease for

for twenty one years, or three lives : and therefore cannot make both. 2. Lessee for lives shall have the rent reserved upon the lease for yeares, and shall not pay rent to the Bishop until the term determined, and so hospitality will decay in the mean time; and where 32 H.8. ca. 8. provided that the old lease be surrendered before the making of a new ; Illusory Surrender upon condition is not within the act : but judgement given against the Plaintiff for not pleading of the said act of 1 Eliz.

Jewels Case, 30 Eliz. Banco Regis, fo. 3.

Lease of a Fair reserving rent, is not within the statute of 1 Eliz. For although the rent be due by reason of the contract, yet it is not incident to the reversion : and 'tis also without remedy by assize or distress.

Lord Mounjoyes Case, 31 and 32 El. banco regis, fo. 3.

Tenant in tayl according to the statute, with power to make Leases, &c. reserving the ancient rent, maketh a lease of two distinct Farms, reserving the ancient rent in one summe out of both the Farms : this is a new rent, and not the accustomed rent, and if he reserve a lesser rent (during his life, and after his death) than the ancient rent, the lease is not good.

If Tenant in tayl be seised of three acres of land, every one of them of equal annual value, and all have been demised for three shillings *per annum* ; in this Case he may not demise one of them for 12 d. *per annum*, or two of them for two shillings *per annum* ; and so *Pro rata*.

Justice

Justice Windams Case, fol. 31 and 32 Eliz. banco regis, in a Writ of Error, fo. 7.

A Man leaseth S. for ten years, and C. for twenty years, and both to another for forty years; after the end of the said several demises, ten yeares expire, the last Lessee enters into S. and upon ouster brings trespass and recovereth; for the joint words of the parties shall be taken *respectively*, and the leases shall commence severally, upon the several determination of the said leases. Joint words shall be taken severally: 1. In respect of the several interest of the Grantors; as if two tenants in common grant a rent charge. 2. In respect of the several interests of the Grantees, as a joint warranty to two several tenants. 3. In respect that the grant cannot commence at one time, as a remainder limited to the right heirs of I. S. and I. N. 4. In respect of the incapacity of the Grantees, to take jointly. 5. *Ratione subjectæ materie*, as rent granted to two co-partners for equality of partition. 6. *Ne res destruat, & ut evitetur absurdum*; as in *cessavit*, the tenure is alledged by homage, fealty, and rent, and *quod in faciendis servitiis prædicta cessavit*, and it shall be construed to such services only, as of which a man may cease.

Brudenells Case, 34 Eliz. banco regis, fo. 9.

If a Lease be made to A. during the life of B. and C. without saying, during the life of the survivor of them: if one of them die, yet the estate is not determined. But A. shall have the land during the life of the survivor; for if a man make a lease of land to two persons during their lives, they assign

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ver their estate, now the assignee hath estate for life of them two; and if one die, he shall have the land, during the life of the Survivor. *Note*, two diversities, th'one a limitation in this case aforesaid, the other a condition; for if a man demise land for 100 years, if A. and B. live so long, in this case, if th'one of them die, the lease is determined, for the lease is conditional, and not determinable by limitation of estate, and the life of a man is collateral to the lease which is but only a Chattel. If an Administrator have judgement and die, his Executors cannot sue execution of that judgement, but he that shall be subject to the payment of the debts, of the first inestates, and that are not the executors of the Administrator, *vide* 26 H. 8. fo. 7.

Hensteads Case, 36 & 37 Eliz. com. banco, fo. 10.

A Feme lessor or lessee at will taketh a Husband, the will is not determined, for it may be prejudicial to the Husband to have it determined; So if one of the lessees, or lessors at will die; but in case where one of the Joynt-lessees at will dieth, nothing surviveth, but the others shall pay all the rent.

Ives Case, 39 & 40 Eliz. com. banco, fo. 11.

J Leaseth a Mannor to S. for thirty years, excepting Wood and Underwood growing upon it; and after leased to him the Wood for 61 yeares, without impeachment of waste, and leaseth to him the Mannor for thirty yeares, after expiration of the first thirty yeares, thirty yeares expire; S. makes waste, I. bringeth an action of waste. *Resolved*, By the exception of Wood, and Underwood, the soyl is excepted, and the Woods growing, &c. are of abundance

dance. 2. The Wood remains parcel of the Mannor, because the lessor had the intire free hold, otherwise if he had leased for life with such an exception; so if one lease a Mannor excepting the advowson for life, the advowson is in gross for life, but if he grant the advowson for life, it remains appendant. 3. By the acceptance of the third lease, the said lease of the Wood for 62 years was presently surrendered, because the Lessee hath affirmed the Lessor to be able to lease.

*Saunders Case, fo. 12. 41 Eliz. com. banco,
In an Action of Waste.*

If a man have land, in part whereof there is a Coal-Mine appearing, and he demise the land to another for life or years, the Lessor may digge for Cole, &c. And the reason is, for that the Mine is open at the time of the demise, &c. and when he demiseth all his lands, it shall be intended, that his meaning was that all the profit of the land should pass, &c. But if the Mine be not open, but within the bowels of the Earth, at the time of the demise, 'tis otherwise.

Also, if a man have in his lands hidden or unknown Mines, and lease the same lands and all Mines therein, the Lessee may dig for them.

Rosses Case, 41 & 42 Eliz.

A Lease is made to A. and his assigns for his life, and the life of B. and C. This is a Lease for three lives, and the survivor of them.

Comtesse

Countess de Salops Case, fo. 13. 42 & 43 Eliz.
Barco Regis.

She brought an Action of the Case against *Crompton*, and declared, that she demised to him a House at will, *Et quod ille tam negligenter & improvide custodivit ignem suum quod domus illa combusta fuit.* The Defendant pleaded, *Non culp.* and it was found not guilty. And 'twas adjudged, that for the permissive waste, no action lieth against the opinion of *Brook*, in title waste, 52. and the reason of the judgement was, for that at the Common Law no remedy lieth for waste either voluntary or permissive, against the lessee for life or years, because the lessee hath interest in the land by the act of the lessor, and it was his folly to make such a lease, and not to restrain him by Covenant, Condition, &c. And by the same reason, Tenant at will shall not be punished for permissive waste: But if Tenant at will commit voluntary waste; as pulling down of Houses, cutting of Trees, a general action of Trespass lieth against him, for that these do amount to the determination of the Will, without the entry of the Lessor: but it was agreed, that in some Cases where there is confidence put in the Party, an Action of the Case lieth for negligence, although the Defendant cometh to the possession by the act of the Plaintiff: as, 12 E. 4. 13. If one do commit his Horse to one to keep safely, the Defendant *Equum illum tam negligenter custodivit quod ob defectum bonae custodiae interivit,* an action upon the Case lieth for this breach of trust; also 2 H. 7. 11. If my Shepheard which I trust with my sheep, and by his negligence they be drowned or otherwise perish, an action upon the Case lieth against him; but in this Case at the Bar there

there was a demise at will made to the Defendant and no confidence reposed in him; wherefore it was ordered, that the plaintiff should not recover by her Bill.

Case of Ecclesiastical Persons.

43 *Eliz. fo. 14. In the High Court of Parliament.*

AT a Parliament holden in this Michaelmas term it was resolved by the two Chief Justices, *Popham* and *Anderson*, and divers others Justices assistants to the Lords of the Parliament, in the upper-House, that Leases made to the Queen, by Colledges, Deans and Chapters, or any other, having spiritual or Ecclesiastical livings, against the provision of the Act, 13. *Eliz. cap. 10.* are restrained by the same Act, as well as Leases made to common persons, for they are disabled by Parliament to make estates: the King being the head of the Commonwealth may not be an Instrument to defeat the provision of an Act of Parliament made *pro bono publico*. For though the Queen by the Common Law, had ability to take it, yet in so much the Parliament had disabled them to make states, estates made to the Queen against the Act, are void.

Covenants, &c. Concerning Leases, Assurances, &c.

Spencers Case, 25 Eliz. Banco Regis, fol. 16.

A Lessee doth Covenant for himself, his Executors, and Administrators, with the Lessor, that

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that he, his Executors or Assigns shall build a Brick-Wall upon parcel of the Land demised, &c. afterwards the Lessee assigns over his term to B; in this Case B. is not bound to build the Wall.

When the Covenant extends to a thing *In esse*, parcel of the demise, then the thing to be done by force of the Covenant, is *quodammodo* annexed and appurtenant to the thing demised, and shall run with the Land, and bind the Assignee, although he be not bound by express Covenant. But when the Covenant extends to a thing which had not essence, at the time of the demise made, that cannot be appurtenant, or annexed to a thing which had not essence. As, if a Lessee Covenant to repair the Houses to him demised, during the term, this is parcel of the contract, &c. and shall bind the Assignee, although he be not bound expressly by the Covenant. But in this Case, the Covenant concerns a thing which had not essence at the time of the demise, but to be made after, and therefore it shall bind the Covenantor, his Executors and Administrators, and not the Assignee, for the Law will not annex the Covenant to a thing which had not essence. It was resolved in this case if the Lessee had Covenanted for him and his Assigns, &c. that in as much as it was to be builded upon the thing demised, it should bind the assignee, by express words. Also, if a warranty be to one, his Heirs and Assigns, by express words, the Assignee shall take benefit thereof, and have a *Warrantia carta*.

But although the Covenant be for him and his assignees, yet if the thing to be done be meerly collateral to the thing demised, and do not concern the same, the assignee shall not be charged; as if the Lessee Covenant for him and his assigns to build a house upon the land of the Lessor, which is not parcel

cell of the demise, or to pay any collateral Sum of money to the Lessor, or to a stranger, this shall not bind the assignee. Also in a Case of goods, as Sheep, Cattel, &c. there is not any privity or reversion in the assignee, but meerly a thing in action in the personalty, which cannot bind any but the Covenantor, his executors or administrators which do represent him. The same law is, if a man demise lands for years, with a stock of Cattel, or sum of money, rendring rent, and the lessee Covenants for him, his executors, administrators, and assigns, to deliver the stock of Cattel, or the sum of money, at the end of the term, yet the assignee shall not be charged with the Covenant.

This word (*Concessi*) or (*Demiſi*) imports a Covenant, and if an assignee of a lessee be evicted, he may have a Writ of Covenant, so shall Tenant by statute, or *Elegit* of a Term, or he to whom the lease is sold by force of an execution, &c.

If a man grant to a lessee for years, that he shall have so many estovers, as shall serve to repair his House, or that he shall burn within his House, or such like, during the Term; that is appurtenant to the land, and shall run with the same as a thing appurtenant, in whose hands soever the same cometh.

Assignee of an assignee, executors of an assignee, ASSIGNEES of executors, or administrators of every assignee, may have action of Covenant, for all are comprised within this word (assignees) for the same right that was in the Testator, or intestate, shall go to the executors or administrators. It was resolved, that the act of 32 H. 8. c. 34. extendeth only to Covenants which touch the thing demised, and not to collateral Covenants.

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This word (*Concessi*) or (*Demisi*) imports a Covenant, and if an assignee of a lessee be evicted, he may have a Writ of Covenant, so shall Tenant by statute, or *Elegit* of a Term, or he to whom the lease is sold by force of an execution, &c.

If a man grant to a lessee for years, that he shall have so many estovers, as shall serve to repair his House, or that he shall burn within his House, or such like, during the Term; that is appurtenant to the land, and shall run with the same as a thing appurtenant, in whose hands soever the same cometh.

Assignee of an assignee, executors of an assignee, ASSIGNEES of executors, or administrators of every assignee, may have action of Covenant, for all are comprised within this word (assignees) for the same right that was in the Testator, or intestate, shall go to the executors or administrators. It was resolved, that the act of 32 H. 8. c. 34. extendeth only to Covenants which touch the thing demised, and not to collateral Covenants.

Slingsbyes Case, 29 Eliz. fo. 18. Upon errors in the Exchequer Chamber.

IF any party Covenantor in a Tripartite Indenture break Covenant, all the rest of the parties, Covenantees, are to maintain the action, notwithstanding the words of the Covenant, are; *Et ad & cum quolibet eorum*. But if a man demise to A. black Acre, to B. white Acre, to C. green Acre, and Covenant with them, and every of them, in this Case, in respect of the severall interest by these words, *And every of them*, the Covenant is made severall, but if the demise be made to them joyntly, then these words in the Covenant (And every of them) are made void.

A man cannot bind himself to three, and to every of them, to make that joynt and severall at the Election of several persons, for one self same cause; for the Court will be in doubt for which of them to give judgment.

It was resolved, that an interest cannot be granted jointly and severally, if a man grant *Proximum Advocatorem*, or make a Lease for term of years of land to two jointly and severally, these words severally are void, and they are jointenants; but a power and authority may be jointly and severally, as to make livery, or to sell, for they have no interest or Action, but are as servants to others. And judgment was reversed.

Roswells Case, 35 Eliz. fol. 19.

BArgainor of Land covenanteth to make to the Bargainee such assurance as his Counsel shall advise, the Bargainee himself cannot devise it, although

though he be learned in the Law, for then it would be no good plea to say, *Quod consilium non dedit ad-
visamentum.*

Higginbottoms Case, 35 Eliz. Banco Regis, fol. 19.

A Parson assumeth to I. S. to make him such an estate in a Rectory, as the Counsel of the said I. S. shall devise, the Counsel shall be given to I. S. and he shall notifie it to the Parson.

Stiles Case, 38 Eliz. Banco Regis, fol. 20.

A Charter with the words *Hæc Indentura*, without a manual Act of indenting of the paper or parch-
ment, is not an Indenture.

*Sir Anthony Maynes Case, 38 Eliz. fol. 20. Error
in Banco Regis.*

Sir A. M. leaseth to S. for twenty one years, and bindeth himself to make a new lease unto him, upon surrender of the old; and leaseth to another for 30 years by fine, Scott the first lessee bringeth Debt, and had judgment. If you be bound to enfeoff one in the Mannor of D. before such a Feast, if you make a Feoffment to another of this Mannor, before the same Feast, you have forfeited the obligation, although that you purchase the land again, before the said Feast, because that you were once disabled to make the Feoffment.

If a man lease a Mannor for years, and the lessee covenanteth to uphold the Houses, and to leave the same Mannor in as good an estate as he found it, and during the term, the lessee maketh wast in Houses, and cutting of Timber, &c. the lessor may

have a Writ of Covenant, before the end of the Term, for cutting of the Timber; for it was impossible that the Covenant should be performed after, for the Timber, but otherwise of the Houses, *Fitz. Na. br. fo. 145. K.* It was also resolved, that if a man seized of Lands in Fee covenant to infeoff I. S. upon request, and after he maketh a feoffment of the same to a stranger, in this Case I. S. may have an action of Covenant without request.

Laughters Case, 37 Eliz. fo. 21 banco Regis.

WHere a condition of an Obligation consisteth upon two parts in the disjunctive, and both possible at the time of the obligation made, and after one of them becomes impossible by the Act of God, the Obligor is not bound to perform the other part, for the condition is made for the benefit of the Obligor, and shall be taken most beneficial for him, and he had an election either to perform the one, or the other, for the saving of his Obligation, but now, *Impotentia excusat legem.*

Hallings Case, 47 Eliz. com. banco. fo. 22.

ONe covenanteth to make an estate in Fee at the costs of the covenantee, the Covenantor is to do the first Act, *id est*, to notifie what assurance he will make, that the Covenantee may know what sum to render.

Mathewsons Case, 39 Eliz. Com. banco, fo. 23.

Several persons make several Covenants in one Indenture, or Writing, the Seal of one of them is broken away, that shall not avoyd the Covenant

of the rest, but only the Covenant of him, whose Seal is so debruised, or defaced, *Vide Piggots Case*, in the 11 Report, because several Covenants, otherwise if joint.

Lambes Case 41 Eliz. Com. Banco, fo. 23.

A. Is bound unto B. to give unto B. such a release, &c. before the 22 day of October next, as by the Judge of the Prerogative Court is thought fit In this Case A. must procure the Judge to do it, or devise it, for the Judge is a stranger to the Condition, and the condition is for the benefit of the Obligor, and he hath taken upon him to perform the same at his peril, but it is otherwise if the Obligee or his Counsel should devise it.

Broughtons Case, 43 Eliz. fo. 24 Banco Regis.

IN an action of Debt by *Broughton* Plaintiff against *Pretty*, upon an Obligation, with condition, where the Plaintiff was bound in an Obligation of 100 l. for the Defendant, for the payment of 100 l. to C. if therefore the Defendant should save and keep harmless the said *Broughton*, from all Sutes, quarrels and demands, touching the said Obligation, &c. that then the Obligation to be void, &c. At the day of payment of the 100 l. the Plaintiff cometh to the place where the 100 l. ought to be paid, and perceiving there not any person present to pay the 100 l. for the Defendant, *Broughton* to save the penalty of the Obligation, paid the money to C. and brought his Action upon the Counterbond, and it was adjudged that the Plaintiff should recover; for the payment of the 100 l. is damage and harm. And it is not necessary, whether the

Plaintiff was arrested or sued, &c. Terror of sute, (so as he dare not go about his business) is damnification, although he be not arrested.

*Dean and Chapter de Winsors Case, 44 Eliz. fol. 24.
Banco Regis.*

A Man leased a House by Indenture for years; the lessee Covenants and grants for him and his Executors with the Lessor, to repair the House at all times necessary, the lessor assigns over, and the assignee suffereth the house to decay, the lessor brought an action of Covenant against the assignee, and it was adjudged *per Popham* and all the Court, that the action lyeth although the lessee had not covenanted for his assigns, because in respect thereof the rent is the less, which is, for the benefit of the Assignee, *Qui sentit commodum, sentire debet & onus*. If a man grant one Estovers to repair his house, this is appurtenant to the house, *Fitz. H. nat. br. 181. 28 H. 8. 28.*

Sir Thomas Palmers Case, 43 El. fo. 24. Banco Regis.

Sir Thomas Palmer seised in fee of a great Wood, did bargain and sell to one *Cornford*, and his Assigns 600 cords of Wood, to be taken by Assignment of Sir Thomas; *Cornford* assigns his interest to one *Basset*, and afterward Sir Thomas sells to one *Maynard* such quantity of Wood as will make 4000 cords at election of the Vendee; and afterwards Sir Thomas assigns to *Basset* 600 cords of Wood, to be taken by him, who doth sell the same, and *Maynard* did take them away, and converted them, &c. an Action upon the case was brought by *Basset*, and judgement was given for him; for *Cornford* had an in-

interest which he might assign over, and not a thing in action, or a possibility, for it was resolved, if Sir Thomas did not assign them to *Cornford* upon request, *Cornford* might take them without assignment, for the Grantor cannot by his own act or default, either subvert or derogate from his own grant. Therefore it ensueth, that *Cornford* had an interest that he might assign over. If A. have a house and land, and reasonable estovers in the woods of another, by view and livery of the Bayliff, &c. if A. take estovers without view or delivery, &c. he is a trespassor, although he take less then he ought to have by livery. But if A demand his estovers, and the owner of the Bayliff will not deliver to him, he may have an assize. 2. If the assignment were void, yet the Defendant cannot take Trees cut by another, but out of the residue of the Wood.

The Earl of Rutlands Case, 2 Ja. so. 25. Banco Regis.

EDward Earl of Rutland seised of the Mannor of *Eykering*, by Indenture dated 10 March, Anno 21 Eliz. for augmentation of the joynture of *Issabell* his Countess, did Covenant with Sir *Gilb. Gerrard*; and *Thomas Houlcroft* his Brother, that before the end of Trinity term, then next following, he would assure by fine or other conveyance, the said Mannor to the said Sir *Gilb. Gerrard*, and *Thomas* in fee; which fine or other conveyance, should be to the use of the said Earl, and *Issabell* his Wife, and the Heirs of the said Earl, which Indenture was acknowledged and inrolled in the Chancery, the 28 of the same Month of March, by another Indenture between the said Earl on the one part, and the Lord *Burleigh* on the other part, and Sir *Gilb. Gerrard* and others on the same part, for the advancement of the Heirs

Heirs Males, of the said Earl, the Earl did Covenant, &c. to convey the said Mannor amongst others to the said Lord *Burgleigh*, Sir *Gilb. Gerard*, and others, or to any of them, before the Feast of the Annunciation of our Lady next ensuing, which assurance should be to the use of the said Earl *Edward*, and the heirs males of his body, and for want of such issue, to the use of the heirs males of *Thomas Earl of Rutland*, with divers remainders over, and in the same Indenture, the said Earl *Edward* did covenant, &c. to stand seised to the uses contained in the second Indenture. No fine or other assurance was levied or made by the said Earl *Edward*, before the end of Trinity term.

Afterwards, (*Viz.* 17 September next following) the said Earl *Edward*, acknowledged a note of a fine of the said Mannor of *Eckering*, only to Sir *Gilb. Gerard*, and *Thomas Ho.* and the Heirs of Sir *Gilb.* And the 18. day of the said month acknowledged another note of a fine of the said Mannor of *Eckering*, amongst many other Mannors mentioned in the later Indenture to, the Lord *Burgley*, Sir *Gilb. Gerard*, and other parties to the later Indenture, and both fines were entered in *Ostabis Mich.* next after. And it was proved by divers Testimonies, that the said Earl *Edward*, as well before the Indentures, as after the Fine levied, said, that the said Countess should have the Mannor of *Eckering*. And it was resolved, by *Popham* chief Justice, and all the Court;

First, Although the Indenture being made for declaring of uses of a subsequent Fine, recovery, or other conveyance, to certain persons, and within a certain time, and to certain uses; yet they are but only directory, and do not bind the estate or interest of the land, yet if the Fine, recovery, or other
al-

assurance be pursued according to the Indenture, there cannot be any averment made against the Indenture taken in this Case; that after the making of the Indentures, and before the assurance by mutual agreement of the parties, was concluded and agreed, that the assurance should be to other uses, but if other agreement or limitation of uses, be made by writing or by other matter of as high or higher nature, then the later agreement should stand, for every contract or agreement ought to be dissolved by matter of as high nature as the first was. *Nil tam conveniens est naturali equitati, quam unumquodq; dissolvi eo ligamine quo ligatum est.*

Also it was very inconvenient, that matters in writing should be controuled by averment of parties, to be proved by incertain testimony of slippery memory, and should be perillous to purchasers, Farmers, &c.

2. It was resolved, that if the form of the Indentures be not pursued, (as for quantity of land, the time within which the Fine should be levied, &c.) Averment without writing may be taken, that the Fine, &c. was to other use, than was contained in the Indenture, by reason of a new agreement subsequent, which in this case may be as well by word as writing.

3. It was resolved, that although the Indentures be not pursued, in circumstance of time, quantity, person, &c. yet if no other mean new agreement be proved, the Fine, &c. in judgment of law shall be to the use named in the Indenture. The fines cannot be directed by both the Indentures, although perhaps it was in the meaning of the parties, because the directions and declarations of the first Indentures were controuled and frustrated by the said second Indentures.

*Cases of Executors.**Russells Case, 26 Eliz. fo. 27. banco regis.*

A Release by an Infant Executor under the age of 21 years, is no bar, but upon payment or satisfaction to an Infant Executor, he may acquit and discharge the debt, for so much as he receiveth: All things that he doth according to the Office and duty of an Executor, shall bind him; an Executor may release before probate of Testament, for although he may not have an action, yet the interest of the action is in Law in him at the time of the release.

Middletons Case, 1 Ja. in Com. banco, fo. 28.

IT was adjudged between *Middleton* and *Rymol*, that an executor before probate may release action, although that before the probate, he may not have action, for the right of the action is in him: but if A. release and after takes administration, that shall not barr him, for the right of the action was not in him at the time of the release. Two executors prove the Testament, the third refuseth. yet he may release, *Littlel. 117.* if one be bound to pay a sum of money at a day to come, a release of actions before the day is a barr, and yet before the day he could have no action.

Harrisens Case, 40 Eliz. fo. 28. com. banco.

IT was adjudged, that a judgment upon Debt due by Obligation, shall be paid before a statute made

made for performance of covenants, which are things in contingency, and in future or other Statutes or recognizances for debt. *Vide Sadlers Case* in the fourth Book, although the judgment be after the acknowledgment of the statute.

Piggots Case, 40 Eliz. com. banco, fo. 29.

ONe bringeth Debt as administrator, *Durante minore etate*, of one whom he averred to be within age, and he doth not say, that he was within the age of 17 years, and the Plaintiff was barred, because at that age the administration ceaseth.

Princes Case, 41, & 42 Eliz. com. banco, fo. 29.

AN Infant is made executor, Administration *durante minori etate*, may be committed to the Mother or other friend of the Infant, which shall cease and be void, when the Infant is at the age of 17 years, and this administrator may not sell any goods of the Deceast, unless it be for necessity of payment of debts, for he hath his office of administrator, *Pro bono et commodo Infantis*, and not for his prejudice, also he cannot assent to pay legacies, unless there be assents to pay debts, &c. and if it be a woman under the age of 17 years, and take husband at full age, the administration ceaseth.

Where one hath goods solely, in an inferior Diocess, yet the Metropolitan of that Province, pretending that he had *Bona n. tabilia*, in divers Diocesses, committed the administration, &c. this administration is not void, but voidable by sentence, because the Metropolitan hath jurisdiction in all places within his Province, but if the Ordinary of one Diocess commit the administration of goods, when the party

party hath *Bona notabilia*, in divers Diocess, this administration is meerly void, as well for his goods within the Diocess as without, *vide Vere & Jeffrays Case*, 22 Eliz. in *bankle Roy*, there cited and so adjudged.

Coulters Case. fo. 30, 40, & 41 Eliz. Banco Regis.

AN Executor in his own wrong ought not to retain goods in his own hands to satisfy his own just Debt, for every Creditor by such means when the goods be not sufficient, would strive to make himself executor, *De son tort*, to satisfy himself, and bar others, &c. And it is not reasonable that one should take advantage of his own wrong, *Non facies malum, ut inde fiat bonum, & Melius est omnia mala pati quam mala consentire.* It is also clear, that all lawful acts that such an executor doth, or disfeisor, or an abator, &c. are good.

Hargraves Case, 41, & 42 Eliz. banco Regis, fo. 31.

Lessor bringeth Debt against the Administrator of the Lessee for years, for rent due after the Administration committed in the Debt, and so it ought to be, because he himself took the profits, and nothing is assets in his hands, but the profits, besides the rent; but in all actions brought by executors (as executors) the writ shall be alwayes in the *Detinet tantum*, although the duty accrew in their own time.

Pettifers Case, 35 Eliz. banco Regis, fo. 32.

VPon a *Fieri Facias de bonis testatoris*, the Sheriff returneth *Nulla bona*, a Writ issued to the

the Sheriff to inquire by inquest, if the executors have wasted, and how much, who returneth that they have, and judgment given against them, *De bonis propriis*, they bring error *in redditione Executionis*, & the execution was reversed, for the course is, upon *Nulla bona*, to have a special *Fieri Facias* to make execution *De bonis propriis*, if they have wasted; and if the Sheriff so doth, where they have not wasted, they have remedy against him: but if he taketh an inquest and returneth it, although it be false, there is no remedy against the Sheriff, or any other.

Robinsons Case, 1 Jac. com. banco, fo. 32.

EXecutor brings debt as administrator, and is barred by plea, that he is executor, he may bring debt, as executor, for he was barred, as to the action of the Writ, to have debt as administrator, but not to the action.

Reades Case, 2 Jac. com. banco, fo. 33.

WHEN a man dieth intestate, and a strange person taketh the goods of the intestate, and useth them, or sells them; this maketh him an Executor of his own wrong, for when none assumeth to be executor, nor takes letters of administration, there the using of the goods is sufficient to charge one as executor, *De son terte*, for those to whom the Deceast was indebted unto, have not any other in this case, against whom they may bring their actions, for recovery of their debts. When an executor is made, and he proveth the Testament, or assumeth upon him the charge, and doth administer; in this case, if a stranger takes any of the goods, and claim them for his own, this doth not make him an Executor

curator of his own wrong, because there is not another lawful executor.

A lawful executor shall not be charged, but with the goods that come to his hands, after that he assumes unto him the charge of the Will, &c. but if another man first takes the goods, &c. before the lawful executor hath assumed the execution, or proved the Testament, in this case, he may be charged, as an executor of his own wrong.

*Construction of the Statutes of Jeofails,
&c. Amendment of Records, Fines,
Recoveries, &c.*

Playters Case, 25, & 26 Eliz. banco Regis, fo. 34.

THE Defendant was found guilty in trespass, *Quare clausum fregit & pisces suos cepit*, and damages assessed intirely; it was moved in arrest of judgment, because in the Count neither the nature nor the number of Fishes was shewed. It was answered by the Plaintiff, That the Defendant is found guilty to damages, and so *Non refert* of what nature or number they are. 2. That the Fishes themselves are not to be recovered, but damage for them, therefore no need to shew the certainty. 3. All the damages shall be intended to be given for the Close broken, which is said in the Declaration. 4. It is matter of form, ayded by the statute of 18 *Eliz. cap. 14*. But judgment was staid, for the office of the Declaration is to reduce the Writ to certainty; for otherwise upon such a general Issue, if the Jury give a false verdict, they cannot be attainted, and damages shall be intended to be given for all, because

304 543.
Cammey's
case,
all in
judgment
quantum
monet
verba

cause they are intire, but if they had been severed the Plaintiff shall recover for so much as is well pleaded, and this is matter of substance, and not of form, because it is no default of the Clerk, but of the Plaintiff, and therefore not aided by the Statute.

Walcots Case, 30 Eliz. Banco Regis, fol. 36.

DEbt was brought against Baron and Feme, in the *Detinent tantum*, upon an Obligation by the Feme before Marriage; it ought to be in the *Debet*, and *Detinet* because the Baron had the goods of the wife in his own right, and for that reason debt is brought against the Heir in the *Debet*, and this is matter of substance, and point of the Action, not remedied by the Statute of 18. Eliz. c. 14.

Baynehams Case, 30. Eliz. in Scaccar. fol. 36.

A *N ejectione firme* of Lands in A. B and C. tryed for the Plaintiff by a Visne out of A. only, this is insufficient and not remedied by any Statute.

Gardiners Case, 21. Eliz. Banco Regis, fol. 37.

23. Jurors are returned, 12. appear and find for the Plaintiff, this is remedied by 18. Elizabeth, cap. 14.

Bishops Case, 34. Eliz. Banco Regis, fol. 37.

Variance is between the Writ and count in name, the Plaintiff recovers, the Defendant bringeth error, the Writ was removed into the *Kings Bench*, and the judgements was reversed, because the Statute

remedieth where there is no Original, but not where the Original is vicious, and although it were removed after pleading, &c. yet because the fault appeared to the Court, the Iudgment was reversed.

Tey's Case, 34. Eliz. Banco Regis, fo. 38.

BARON and FEME, levy a fine to one who grants and renders to them two, and to the Heirs of the Baron, and after renders part to the Feme in tail, the remainder over, the Heir of the Husband brings a Writ of Errour, and assigns for errour the said Variance. 1. Resolved, that there needeth not a precise form in render upon a fine, but it shall be in this case construed, as a grant by Chatter, for it is but a grant of record.

2. There are five parts of a fine.

1. The Original.

2. The Licence to accord, for which the Kings Silver is due, and ought to be entred upon the Writ of Covenant, and the summe, and he who payeth it, that is, he in whom the fee reposeth, the Plea, and betwixt whom, &c. and the Land ought to be mentioned.

3. The concord which is the substance of the fine, for if upon that, the Kings silver be paid, although the party dye, the fine is good.

4. The Note, which is many times taken for the Concord.

And lastly, the foot of the Fine, after delivery of the Indentures of the fine, the fine is said to be ingrossed.

3. The Conusor shall not assign errour in the render, because it is to his advantage, and none shall assign errour, except it be to his disadvantage.

Dormers Case, 35. Eliz. Banco Regis. fo. 40.

A Common recovery is had in a Writ of entry, in the *Post de uno annuali redditu sive pensione quatuor marcarum*; and of an Advowson, whereupon a Writ of Error is brought. 1. Because every *precipe* ought to be certain, but here it is in the Disjunctive.

2. A Writ of entry in the *Post* lyeth not of an advowson. But judgment was affirmed, and thereby 'twas resolved, 1. That a common recovery is not like to other recoveries, for it may be averred to an use.

2. It is by mutual consent, & *consensus tollit errorem*. 3. A Writ of entry in the *Post*, lyeth of an advowson common, &c. to suffer a common recovery, and not otherwise, for no other assurance can be had to bear the remainders.

2. The demand of the Rent is good, for one of two things is not demanded, but one thing by two names, for rent and pension are *Synonyma*; and the rather here, because it is said to issue out of Land, which a pension properly cannot. 3. Common recoveries are so usual, that the Court shall take notice that they are common recoveries.

Rowlands Case, 39. Eliz. Banco Regis, fo. 41.

A Pannel of a Jury is annexed to the *Venire facias* without return: this is vicious, and not remedied by 18. *Eliz. cap. 14.* for that remedyeth insufficient returns, but not where no return.

The Countess of Rutlands Case, 36. Eliz. fol. 42.

Robert Moore is returned upon the *Venire facias*, but in the panel before the Justices of *Nisi prius*, and in the *Postea* he was named Robert *Mawre*, if it appear that *Moore* is his right name, and that it is he who is sworn, it is good, for by the common Law this was a discontinuance against all the Jurors, and discontinuances are aided by the Statute, otherwise if it were mis-named in the *Venire facias*, and had his right name in the *Panel* and *Postea*.

Codwells Case, 36. Eliz. Banco Regis, fol. 42.

A Juror who gave verdict, was misnamed in the *Venire facias*, and had his right name in the *Disfringas*, and *Postea*, & for that the Iudgment was arrested.

Nichols Case, 38. Eliz. Banco Regis. fol. 43.

C Brings Debt upon a single Bill against N. who pleaded payment without acquittance, which was found for the Plaintiff, although issue was joyned upon a point not material, yet after verdict this is aided by 32. H. 8. and 18. Eliz.

Bohuns Case, 39. Eliz. fol. 43.

A Fine was levyed of a Mannor and other Lands, to the value of twenty Marks *per annum*, so that the Kings silver is 40. s. which was paid, but in entering of it upon the Writ of Covenant, the Mannor was omitted, and thereupon error was brought; but after that, the transcript of the fine was removed into the Kings Bench, the Iudges of the common place

place amended the Record, because it appears to them that the Kings silver was paid for the mannor and where the Writ of Covenant was, *Dede meipso* for *Teste meipso*, they amended that also, and certified it into the Kings Bench upon diminution, and allowed.

Freemant Case, fol. 45, 41. Eliz. Banco Regis.

IN an original Writ, &c. *Quod nullus faciat vestram conditionem & distructionem*, where it should be *distructionem*, the fault was only in one Letter, the Court resolved upon good consideration, that it was matter of substance: for *Districtio* is a Latin word, and altereth the sence of the Statute; and matter of Substance in an Original Writ is not remedied, but matter of form only, *Vide Statute 32. H. 8. ca. 30. & 18. Eliz. ca. 14.*

If an Original at this day want form, or contain false Latin, or vary from the Register in matter of form, after verdict no judgement shall be stayed or reversed But if it want substance, although it be the misprision of the Clerk, this is not remedied by any Statute.

Gages Case, 41. Eliz. banco Regis, fol. 45.

A Writ of Covenant to levy a fine, bore date after the return, this is amendable because a common assurance, but in other actions no amendment, &c.

Cooks Case, 41. Eliz. com. banco, fol. 46.

A Common recovery of the Mannor of *Isfield*, by the name of *Isfield*, is amendable, because it appeared

peared to the Court, by collateral things, shewed unto them, that *Isfield* was intended to pass.

Cases of Pardons.

*Franklins Case, 36. Eliz. fol. 46. in the
Star-Chamber.*

A Bill was exhibited for a Riot in the Star-Chamber, five years before the general pardon, 35. *Eliz.* And it was resolved that the Kings fine was accepted, but not the corporal punishment; but if it were exhibited within four years, all shall be accepted. In this case, the Kings Attorney may proceed for the fine.

*Guilbert Littletons Case, 39. Eliz. fol. 47.
Star-Chamber.*

A Bill exhibited in the Star-Chamber before the Parliament 35. *Eliz.* and returned after, this is excepted out of the general pardon, for it is depending before the return: but if an Original Writ issueth out of the Chancery, returnable in the common pleas, this is not depending before the return, because out of another Court; but after the return, it shall be said depending by relation, from the day of the *Teste*: and if the Tenant alien before the return and after the *Teste*, this shall be said an alienation, pending the Writ.

Drymooods Case, 42. Eliz. Star-Chamber. fo. 48.

A Bill in the Star-Chamber more than four years, and within eight years, before the Parliament

ment in 39. *Eliz.* the plaintiff dyeth before the general pardon, this is pardoned, for this doth not depend now; and the words remaining to be prosecuted. shall be intended for the party, and not for the Kings Attourney.

Vaughans Case, 40. Eliz. Banco Regis, fol. 49.

A Writ of entry in the *Quibus*, depends in *Wales*, before the general pardon, and after the Demandant had judgment, but the Tenant was not amerced. 1. Resolved, the Amercement is pardoned, because the *Torte* was pardoned, which together with the delay was the ground thereof. 2. The Statutes of *Jeofails* extend to *Wales*, because it was made parcel of England, by the Act of 27. H. 8.

Wyrells Case, 41. Eliz. In the Exchequer, fol. 49.

THE Queen brings debt upon an Obligation made by the defendant, to one who was outlawed, the Defendant pleads the general Pardon; and although that debts due to the Queen are excepted, yet debts originally due to the Subject, and after came to the Queen, are not excepted; also the general pardon is to be taken beneficially, for the Subject, and most strong against the King.

Biggins Case, 41. Eliz. banco regis, fol. 50.

THE King may pardon burning in the hand, where the defendant is found guilty of Man-slaughter, and hath his Clergy in an appeal. 1. Because it is but to notifie to the Iudges, that he hath once had his Clergy, and that he shall not have it again, by the Statute of 4. H. 7. c. 13. 2. Because it is

no part of the judgement, and the party shall go at large, although he be not burned by good construction of the Statute of 18. *Eliz. c. 7.* which provideth, that after Clergy allowed and Burning, he shall go at large, for otherwise when he is pardoned, he shall be imprisoned for ever. In the Star-Chamber, the King may pardon corporal punishment for forgery, &c. but not if attainted at the common Law in an Action of forgery of false deeds.

Halls Case, 2. Jacobi, com. banco, fol. 51.

AC. Libelled, for defamation in the Court Christian against H. and had sentence and costs taxed at a day to be paid; A. sueth an appeal, and obtains a pardon from the King, and brings a prohibition. 1. Resolved, all Sutes in the Court Christian, *Pro salute anime*, or *reformatione morum*, are for the Kings as Suits in the Star-Chamber, and he may pardon them before or after the Sute commenced, but he cannot pardon, where the party sueth for a thing in which he had interest, as Tythes. 2. All proceedings in the Court Christian *ex officio*, are for the King, and he may pardon them. 3. Although the sute may be pardoned, yet he cannot pardon the costs which are taxed. 4. Although the sentence by the appeal is suspended to many purposes, yet until reversal, the party had interest in the costs, nor pardonable, and after a consultation was granted for the costs.

Pages Case, 30. Eliz. in the Exchequer, fol. 52.

IDemiseth to his wife who is an Alien, and before the death of the Testator indenized, the date of the Letters Patents is corrupted, so that they bore date

date after his death, she obtains an exemplification, by commission under the Exchequer Seal, it is found that she was an Alien, and an information is brought against her, and she pleads the exemplification. 1. Resol. This office is void, for every office of Intitling, as this is, ought to be by commission under the great Seal; but an office of instruction may be under the Exchequer Seal. 2. It appeared not, what authority the Commissioners had, but *Inquisitio capta virtute Cuiusdam Commissionis, &c.* 2. That the exemplification was pleadable by the Statute of 13. Eliz. c. 6. which extends to all Patents whatsoever without any restraint; An exemplification and an *Inspecimus*, as an *Innotescimus* and a *Vidimus* are all one: A Constat cannot be had without Affidavit, and it is when Letters are casually lost; An *Innotescimus*, or a *Vidimus*, are alwayes of a Charter of Feoffment, or other Instrument, not of Record.

Knights Case, 31. Eliz. Communi Banco, fol. 54.

THe Prior of St. John of Je. 26. H. 8 Leased divers houses, reserving 5. l. 10. s. 11. d. per annum at the four usual feasts in L. viz. for one house 3 l. 11. d. and so severally of the others, with condition of re entry for non payment, and after surrenders to H. 8. who in Anno 36 grants one house to the Lessee, and another in fee, the Lessee dyeth; It is found by Inquisition in the Com^o. of Mid^o. by Commission under the Exchequer Seal, that 37. s. 5. d. parcel of the said rent was arrear at M. for a quarter of a year, before the return of the office or seizure, the King grants the residue of the houses to one who leaseth to the Plaintiff, who upon the entry of the Executors of the first Lessee brings trespass, and the Court being divided, it was argued in the Exchequer Chamber by all the Judges.

1. Re-

1. Resol. This is an intire Lease, and the *viz.* is but a declaration of the several values of the houses, and no severance of the reservation, but by apt words divers persons may be severally leased by one demise, and several rents reserved. 2. Admitting them several rents, yet the condition is intire, and, in case of a common person by severance of any part of the reversion, will be extinct. 3. This being in case of the King his patentee of part shall not take advantage of the condition, but the King himself may, and patentee to whom he grants the residue, although the Lease originally made by a Subject. 4. Although it be found that more was arrear than was reserved quarterly, yet it sufficeth that the office had matter of substance, and the jury in M. may find which are the usual feasts in L. 5. the grant after office, and before the return of it is good, and by entry without other seisure the Lease is void. 6. This office under the Exchequer Seal is sufficient to intitle the King to a Chattel.

Specots Case, 32. Eliz: Banco Regis in error. fol. 37.

S. & sa feme bring a *Qu. impedit* against the Bishop of E. and declare that J. A. was seised of a Mannor, to which an advowson was appendant, and demised it to the feme for life, and they presented D. W. who dyed, and so it belongs to them to present; the defendant pleads that the plaintiff presented one who is *schismaticus inveteratus*, whereof he gave notice to the plaintiff; It was adjudged for the plaintiff, in the common place, an error brought thereupon.

1. Error. Because no presentment alledged in I. A. but over-ruled for the presentment of the plaintiff, is sufficient for themselves. 2. The Bishop ought

ought not to shew any particular schism, for the Court of the King cannot judge of it, but the Bishop is Judge: also it is cause to remove a Coroner, *quia minus idoneus*. It was answered, that he ought to shew the heresie in certain; and although the Bishop is Judge, yet because his Act is not of Record, it is traversable; and, although it belongs not to the Kings Court to judge of Heresies, yet the general cause of sure being in their consufance, they shall determine of it by advice of Divines, and the cause of removing a Coroner is not traversable. 3. The Bishop is twice amerced, and a man can be amerced but once towards one man, &c. It was answered, that he was but once amerced; for the Judgement in the Kings Bench was but a rehearsal of the former; yet admitting the second Judgement thereby void, nevertheless the first Judgement is good by the common Law without damages, *Quod fuit concessum per totam Curiam*.

Foßar. 32. El. in Banco le Roy. fo. 59.

IT was resolved, that the Constable having a warrant to bring one *coram aliquo Justiciar*. &c. it is at the election of the officer to bring the party so attached to what Justice he will; For it is greater reason to give the election to the Officer, who (in presumption of Law) is a person indifferent, and sworn to execute his office duly, than to the delinquent. Wray chief-Justice said, that a Justice of Peace may make his warrant to bring the party before himself, and it is good and sufficient in Law; for it is most like, that he hath the best knowledge of the matter, and therefore most fit to do justice in that matter; upon refusal to find surety, the Constable may commit him without a new warrant.

Gooches

Gooches Case. 32. El. in Banco le roy, fol. 60.

WRay chief Justice said that if A make a fraudulent conveyance of his Lands to deceive a purchaser, against the Statute of 27 *El.* and continueth in possession, and is reputed as owner; B. entereth in communication with A. for the purchase, and by accident B. hath notice of this fraudulent conveyance; Notwithstanding he concludes with A. and takes his assurance. In this case B. shall avoyd the said fraudulent conveyance by the said Act, notwithstanding the notice; for the Act by expresse words hath made the fraudulent conveyance voyd as to the purchaser. And for as much as that is within the expresse provision of the Statute, it ought to be taken and expounded in suppression of fraud, Resolved, that fraud may be given in evidence, because the estate is voyd by the Act of 13. *Eliz.* and fraud is hatched in secret, *in arbore cava & opaca.*

And according to this opinion, it was resolved *Per tot' cur' in communi banco Pasch. 3. Jac.* where one *Bullock* had made a fraudulent estate of his Lands within the Statute of 27. *Eliz.* to A. B and C. and after offered to sell the same to one *Standen*, and before the assurance by *Bullock*, *Standen* had notice thereof, and notwithstanding proceeded, and took the assurance from *Bullock*, *Standen* avoyed the former assurance of fraud by the said Act, for the notice of the purchaser cannot make that good, which an Act of Parliament hath made void as to him; And it is true, *Quod non decipitur qui scit se decipi.* But in this case the purchaser is not deceived; for the fraudulent conveyance whereof he had notice is made void, (as to him) by the Statute, and therefore he knew it could not hurt him.

Sparkes

Sparries Case, 33. Eliz. in Scaccar. fol. 61.

IN ACTION of Trover and Conversion, the Defendant pleads that there is another Action depending in the Kings Bench for the same Trover, and good; for in Actions which comprehend no certainty, as assize or trespass, this is no plea before a Count; because thereby it is made certain, and then it is a good plea, and not before: but in this Action and debt and detinue, it is a good plea at the first, because they are certain: that an Action is depending in an inferior Court is no plea.

Cases of By-Laws.

*Chamberlain de Londons Case, 32. El. in banco
le Roy, fol. 66.*

THE Inhabitants of a Village without any custom, may make Ordinances or By-Laws for reparation of the Church, or of highwayes, or any such thing which is for the publique weal generally; and in this case the consent of the greater part shall bind all without any custom, *vide* 44. E. 3. 19. But if it be for their own private profit for that Town, as for their well ordering of their common of pasture, or such like, then without custom they cannot make by-Laws. And if it be a custom, yet the greater part shall not bind all, if it be not warranted by the custom; for as custom hath created them, so they ought to be warranted by the custom, 8. E. 2. tit. ass. As pontage, murage, toll, and such like, as appeareth in 13. H. 4. 14. In which cases the sums for reparations of the Bridgewalls, &c. ought to be reasonable, that the Subject may have more benefit thereby than charge.

Clerks

Clerks Case, 38. Eliz. in communi Banco, fol. 64.

KING Edward 6. did incorporate the Town of St. Albons, and granted them to make Laws and Ordinances, &c. The Term was kept there, and the Mayor, &c. by assent of the Plaintiff, assessed every Inhabitant for the charges in erecting of the Courts there, and if any did refuse to pay, &c. to be imprisoned, &c. The Plaintiff being Burges, refused to pay, &c. and the Mayor justified, &c. and it was adjudged no plea, &c. For this Ordinance is against *Magna Charta, cap. 29. Nullus Liber homo imprisonetur*, which act hath been confirmed divers times (*viz.*) thirty times, and the assent of the Plaintiff cannot alter the Law in this case. But it was resolved, that the Mayor, &c. might inflict reasonable penalty, but not imprisonment, which penalty ought to be levied by distress; for which offence an action of Debt lyeth, and the Plaintiff in this case had judgment.

Jeffrays Case, Michaelis 31, 32. en Bank le Roy, fo. 66.

WILLIAM Jeffray Gent. brought a prohibition against Abraham Kenshley, and Thomas Foster, Churchwardens of Haylesham in Com. Suffex, for that they sued him in Court Christian before Doctor Drury for certain mony imposed upon him without his assent, for repair of the Church, That the Churchwardens, with the assent of the greatest part of the Parishioners *juxta quantitatem & qualitatem possessionum & reddit. infra dict. parochiam existent.* determined and agreed to make a taxation for repair of the said Church; and that notice of such assembly was given in the Church, at which day the Churchwardens, and greater part of the Parish, which were there

there assembled, made a taxation (*viz.*) every occupier of Land for every Acre 4 d. &c. Jeffray dwelt in another Parish, and declared that the Parishioners of every Parish ought to repair their Church, and not the Church of another Parish. Cook of Council with the defendant demurred in Law, and after many arguments, a Writ of consultation was granted. And it was resolved, That the Court Christian hath *consulans de reparatione corporis sive navis Ecclesie*: Briton, who writ in 5. E. 1.

And in the Statute of *Circumspectè agatis*, but in *Rebus manifestis errat qui auctoritates legum allegat*, *quia perspicue vera non sunt probanda*. It was also resolved, that although Jeffray did dwell in another Parish, yet for that he had Lands in the said Parish, in his proper possession, he is in the Law *Parochianus de Halesham*.

But it was resolved, that where there was a Farmor of the same Lands, the Lessor that receiveth the rent, shall not be charged, but the Inhabitant is the Parishoner, and the receipt of the rent doth not make the Lessor a Parishoner.

Divers of the Civil Lawyers certified the Court, that the Church-wardens, and a greater part of the Parishioners (upon a general warning) assembled, may make a Taxation by their Law, and the same shall not charge the Land, but the Person in respect of the Lands for equality and indifferency, and this was the first leading case that was adjudged and reported in our Books touching these matters, and many causes after were adjudged thus, and now it is generally received for Law.

*The Lord Cheneys Case, 33. Eliz. in cur. Wards.
fol. 68.*

IN a devise of Lands by writing, an averment out of the will, shall not be received, for a Will concerning Lands, &c. ought to be in writing, and not by any averment out of the same; otherwise it were great inconvenience that not any may know by the written words of the Will, what construction to make, if it might be controuled by collateral averment out of the Will.

Cases of Usury.

Burtens Case, 34. Eliz. banco Regis, fol. 67.

ALends to T. W. 100. *l.* 7. July 21. *Eliz.* in consideration of which, T. W. grants to him a rent charge of 20. *l.* *per annum*, the first payment to be at the Nativity, 1580. upon condition of payment of the said 100. *l.* this is out of the Statute of Usury, for he had a 100. *l.* for a year and a quarter, without consideration, and if he pay it within this time, A. shall not have the rent, so that he was not assured of any consideration: But if it were agreed between them that the 100. *l.* shall not be paid, this is within the meaning of the Statute. A Demurrer is a confession of all such matters in fact only, as are well and sufficiently pleaded.

Claytons Case, 37. Eliz. Com. Banco, fo. 70.

THirty pound was lent for half a year to have for it thirty three pound, if the son of the obli-

obligee be then in life, if not 27 pound, this is within the intent of the Statute of Usury: *Usura dicitur ab usu & ære, quasi usu-æra, (i.e.) usus aris? Et usura est commodum certum, quod propter usum rei mutata recipitur*: Glandvile, lib. 7. cap. 16.

Hoes Case, 34. Eliz. fol. 70.

A Duty certain upon a condition subsequent may be released, before the day of the performance of the condition; but a duty uncertain at the first, and upon condition precedent to be made certain, after; this in the mean time is but only a meer possibility, and therefore cannot be released. And it was adjudged 4. *El. in communi banco*, that by a release of all actions, suits, and quarrels, a covenant before breach of it, is not released thereby. But by a release of Covenants, the Covenantor is discharged before the breach, *vide Litt. 170.*

A release in the time of vacation to the Patron dischargeth an annuity, wherewith the Parson is charged in respect of the Parsonage, and a warranty may be released before suite, because he may have a *Warrantia chartæ*.

St. Johns Case, Eliz. Banco Reg. s, fol. 71.

D Aggs, Pistolls, &c. are within the Statute of 33. H. 8. ca. 6. The same Statute doth prohibite Cross-bows, and under the same name stone bows are forbidden; for if a small alteration or addition should defeat the penalty of the Act, the Statute should be of small effect. And it was resolved, that the Sheriff, or any of his Officers, for the better execution of Justice, may carry handguns or other weapons invasive or defensive, and not restrained by the

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general prohibition of the said act, *vide* 3 H 7. fo. 1.

Williams Case, 38 Eliz. Banco Regis, fo. 72.

ONe man shall not have an action of the Case for common Nufans made in the high way, because it is a common Nufans, and it is not reason; that any particular person should have an action, for then every particular person, might have an action for the same, and so thereby one might be punished an hundred times for one cause. But if any particular person have more particuler damage than another, he may have a particular action upon the Case for his particular injury, and for common Nufances, which are equal to all the Kings people, the common Law hath appointed other Courts (*viz.*) Leets, &c. A prescription to do Divine Service in a Chapel for the Lord and his Tenants, is remediable only in the Court Christian; but for the Lord and his private family, an action of the Case lyeth for the Lord only,

Case of Orphans of London, 35 Eliz. banco Regis, fo. 37.

IF any Orphan of London sue for goods, &c. in the Court Christian, or of Requests; a prohibition lyeth, because their government by their custom belongs to the Mayor of L. So if a Will be proved in the Court Christian, the probate whereof belongeth to the Lord of the Mannor.

Wymarks Case, 36 Eliz. banco Regis, fol. 74.

PLaintiff in an *Ejectione firmæ*, counts of a Lease of R. S. the defendant pleads in Barr as indenture of bargain and sale (and sheweth it) by the said R. S. to E. W. who was seised until disseised by R. S. who

who leased to the Plaintiff, and he as servant to E. W. enters; Three Terms after, the Plaintiff replies, that the bargain and sale was upon condition, which was broken, and the bargainor entred and leased to him, and did not shew forth the deed of bargain and sale: judgment given for the defendant.

1. Resolv. When a deed is shewed to the Court, it remaineth in the Court, all the Term in judgment of Law, because the Term is but one day in Law, and this as well to strangers as parties, to take advantage thereof without shewing, but at the end of the Term it shall be delivered to the party, if it be not denied, for then it shall remain in Court to be damned, if it be found not his Deed.

2. The Course in the Kings Bench is, that imparlances to plead in barr are entred, but not imparlances to reply or rejoyn. so that the Replication here, although it be three Terms after the barr, yet it shall be intended here the same Term, and so he shall not need to shew the Deed.

Cliftons Case, 35. Eliz. fol. 75.

If a woman Tenant for life take a husband which committerh waste, and after the wife dyeth, the husband is dispunishable of and for such waste; for the Writ is, *Quare de communi consilio &c. provisum sit quod non liceat alicui vastam venditionem seu destructionem facere de terris, &c. sibi demissis ad terminum vite vel annorum, &c.* And in this case the husband hath not any estate for life in this land; but the wife hath estate for life, and the husband but only an estate in her right, and so he is not within the Act.

Pilkingtons Case, 43 Eliz. en banco le Roy, fol. 76.

IT was resolved, *Per tot^u Cur.* that when a distrefs is taken for damage feſant, that the party may tender amends until the beaſts be impounded ; but after they be in the pound, they are in the cuſtody of the Law, and then the tender cometh too late. It was alſo reſolved, that tender of amends to the Bayliſſ or ſervant that taketh them, will not ſerve ; for he cannot deliver the diſtrefs once taken, no more than change the avoury of his Maſter, or demand rent upon a condition of re-entry.

The Earl of Pembrooks Case, 36 El banco Regis, fol. 76.

WHere the defendant ſheweth a deed to the Court, the Plaintiff may pray it to be entred *in hac verba*, the ſame term, but not after.

Pagetts Case, 35 El. in Communi banco, fol. 76.

IT was reſolved, that if Tenant for life, the remainder for life, the remainder in fee, if tenant for life maketh waſte in trees, and after he in remainder for life dye, in action of waſte, is maintainable, for the waſt done in the life of him in remainder for life, becauſe it was to the diſinheritance of him in remainder in fee And now the impediment (which was the mean eſtate for life) is taken away. *Et remoto impedimento emergit actio* ; It was reſolved, that when the trees are cut down, the property thereof belongeth to him in remainder in fee. And where it is ſaid in ſome Books ; That he in remainder or reverſion in fee, ſhall not have an action of waſte, it is to be intended, during the continuance of the mean remainder

der. And in other Books is said in this case, that an action of waste doth lye; it is intended after the death of him in remainder for life.

Booths Case, 36. Eliz. in Communi banco, fol. 77.

George Booth brought an Action of waste against Skevington, and declared that Sir William Booth demised for years to Ensor, who assigned to Skevington. The Defendant pleaded an assignment to Elizabeth Cave, before which assignment no waste was made; the Plaintiff replied, and shewed the Statute 11. H. 6. c. 5. and that the grant to Elizabeth Cave was made to the intent he should not know against whom to bring his action, and averred, that Skevington did take the profits; the Defendant rejoined that Elizabeth Cave granted her estate to A who demised to the Defendant at will, and traversed the fraud, &c. the Plaintiff demurred, it was resolved, that every assignee of every Lessee mediately or immediately is within the said act, for the Statute was made to suppress fraud, and deceit, and therefore it should be taken most beneficially. Secondly, that he in remainder is within the said act, as well as he in reversion. Thirdly, The intent of fraud aforesaid, is not traversable, but the taking of the profits, which is a thing notorious, whereof the Country may have knowledge. In a formedon the Tenant pleaded, *Non tenuit*, the demandant said that he made a feoffment to persons unknown, to defraud him of his tenancy, and to keep the profits; the pertinancy of the profits, and not the Feoffment is traversable.

Samons Case, 36 Eliz. banco Regis, fol. 77.

THe Plaintiff and Defendant referred all Controversies to the Arbitrement of I. S. who did arbitrate, that the Defendant shall enter into an obligation to the Plaintiff, that the Plaintiff and his wife shall enjoy certain lands which he had not done; this is void, for the incertainty of what sum the obligation shall be, for the award ought to be certain, like a Judgment: Also the award was void as to the feme, for she was a stranger to the submission.

Graves Case, 37 Eliz. banco Regis, fol. 78. Replevin.

THe Plaintiff intitles himself in Barr to the avowry to Common, &c. which was traversed, the Jury found, that every, &c. time out of mind have used to pay for the Common a Hen and five eggs, the Plaintiff had judgment, for he needs not shew more than makes for him, for this is not *Modus communie*, paying so much, or parcel of the Issue, but a collateral recompence to be paid for the Common, to which the Terretenant had remedy, but if the Terretenant had no remedy, then the Commoner shall have the Common *Sub modo*, and may be disturbed by the Terretenant.

Fitz-Herberts Case, 37 Eliz. banco Regis, fo. 97.

THe Father-Tenant for life, the remainder to the Son in tail, leaseth for years to A. to the intent to barr the Son; A. infeoffeth I. S. to whom the Father releaseth with warranty, and dyeth, this doth not barr the Son, for although that the disseisin which is made by the feoffment, precedes the warranty.

warranty, yet because it was to that intent, the Law will adjudge upon the intire act, and so a warranty by disseisin. 2. Although the disseisin was made to the Father, yet because he consented unto it, the warranty commenceth by disseisin; but if the Father had made a feoffment in fee, and dyed, this shall bind the Son, if it be with warranty.

Feords Case, 37 Eliz. Com. Banco, fol. 81.

A Prebend leaseth for 70. An. Patron Dean and Chapter confirm *dimissionem predictam in forma predicta facta* for 51 years, & non ultra; this is a confirmation for all the Term; for when they confirm *dimissionem*, &c. for 51 years, it is repugnant, but if they had recited the Lease, and confirmed the land for 51 years, this had been good, for they have an authority, coupled with an interest, otherwise if only a bare authority: but by what words soever they confirm a lease for life, or gift in tail for part, this is a confirmation of all, because they are intire; so if the estate of the disseisor, or his Lessee for life, be confirmed for an hour, yet all is confirmed.

Cases of Customs.

Snellings Case, 37 Eliz. Com. Banco, fol. 82.

S Brings debt upon an obligation against an Administrator, who pleads, there is a custom in L. that an Administrator shall pay debts upon contract to a Citizen, as well as upon obligation, and that S upon a contract had recovered; and good. R. Resol. Although that debt is given against an Administrator by the statute of 31 E. 3. yet because they

were charged as Executors before, so that only the name is changed, the custom generally alledged is good. 2. The ordinary by taking the goods, was chargeable at the common Law. 3. This custome bindeth strangers.

The Case of Market-overt, 38 Eliz. fol. 83.

SHops in L. are Markets overt for things to be sold there by the trade of the owner, therefore if plate be sold there in a Scriveners shop, the property is not altered; otherwise in a Gold-smiths shop, if he who passeth in the street may see it. *Nota*, the reason of this case extends to all Markets overt in England.

Perimias Case, 41 Eliz. Com. banco, fol. 84.

IT is a good custome of a Mannor, that all sales of Lands within that Mannor be presented at the Court of the Mannor. *Obj.* What remedy if the Steward will not except the presentment? *Resp.* What remedy if the Clerk will not intoll a deed of Bargain and sale, and therefore *Caveat Emptor*. 2. *Obj.* That Interest is by the feoffment vested in the feoffee, which shall not be devested by the Custome. *Resp.* That livery was ordained to give notice; and a Custome which addeth more solemnity and notice, is good.

Sir Henry Knivets Case, 38 Eliz. Banco Regis, fo. 85.

TENANT for life, the remainder in fee, leaseth for years; the Termor is ousted, the disseisor leaseth for years; his Lessee sowes the land, tenant for life dyes, he in the remainder enters, I. S. takes the Corn

Corn, he in remainder brings trespass. The right of the Corn is not in the Plaintiff or Defendant, but in the Lessee for years or Lessee for life, but the Lessee of the disseisor had right against the Plaintiff by reason of the possession: and for that if he had pleaded that he had entred to take the Corn, this had been good, but because he pleaded *Non culp.* the Plaintiff had judgement for the Entry, and was barred for the residue.

Penrins Case, 38. Eliz. Banco Regis, fol. 85.

W. P. Brings a *Quod ei desorceat* in nature of a Writ of Right in *Wales*, and after the mise joined is non-sute, Judgment final is given, he brings the like Writ, and the first Judgement is pleaded in barre, the demandant demurres, and adjudged against him, and he brings Error. 1. Although by the Statute of 12. E. 1. Trial of Right in *Wales* shall be by Common Jury, yet Judgment final shall be given. 2. Erroneous Judgement final in right shall bind until it be reversed. 3. Judgement final shall not be given upon default of the Tenant in a Writ, but a *Petit cape* shall issue, for peradventure he may save his default.

Cases of Executions.

Blumfields Case, in banco le Roy, 39 Eliz. fo. 86.

Two men were bound jointly and severally in an Obligation, the one was sued, condemned, and taken in Execution, and after, the other was sued, condemned, and taken in Execution; and after the first escaped, and the other brought an *Audita querela*

la; and although the Plaintiff might have his Action against the Sheriff upon the escape, yet until he be satisfied indeed, the other cannot have his *Audita querela*, for if the defendant be sued by one Writ, or several proces, although the entry be, *Quod uicem fiat executio*. This is to be understood, of one execution with satisfaction, for he may have three bodies in execution. *In communi banco inter Lynacre & Rodes Case*, 4 il. 33. El. It was adjudged, that notwithstanding the Conusor in a Statute Staple was taken and escaped, yet his goods and lands upon the same Statute, may be extended, for the escape, and the action which the Plaintiff might have against the Sheriff, is not a satisfaction of the debt. And if so the Conusor be taken, and dye in execution, the Conussee shall have execution of his goods and lands. And it was adjudged, 24 E. int. *Jones & Williams*, that where two men were condemned in a debt, and the one taken and dyed in execution, yet the taking of the other was lawful, and then it was resolved, *Per tot. Cur.* that if a defendant dye in execution, yet the Plaintiff may have a new execution by *Elegit*, or *Fieri facias*, &c.

The execution of the body is an execution, but not a satisfaction, as appeareth in 4 H. 7, 8. and 32 H. 6. 47. In *Hillaryes Case* adjudged, but a gage for the Debt, for the words of the Writ are, *Capias l. S. ita quod habeas corpus ejus coram Justic. nostris, &c. ad satisfaciendum G. L. de debito & damnis, &c.* and so his body is taken to the intent he should satisfy, and when the Defendant hath paid the money, he shall be discharged out of Prison.

Garmons Case, 40 Eliz. fo. 88.

L Ayton recovered against *Walwyn*, in an Action of Debt, and out-lawed the Defendant after judgment,

ment, and sued a *Cap. utlagat.* and delivered the same to *Garnon* the Sheriff, who did take the party, and before the return of the Writ the Defendant escaped: and thus it was resolved, that if any one at the Common Law have Judgment in an Action of Debt, and after Judgment out-law the Defendant, then the Plaintiff is at the end of the Sute, for any process to be sued in his name; yet if the Defendant be taken by *utlary*, at the Sute of the King, no *Lashes* being in the Plaintiff, in continuance of his process, he shall be in execution for the Plaintiff, if he will, for reason requireth, that if the King shall have benefit by the Sute of the party, so the Plaintiff shall have benefit by the Sute of the King; if Judgment in error be affirmed within the year, a *Capias* or *fieri facias* lyeth without any *Scire facias*, although in another Court.

Frosts Case in communi banco, 41 Eliz. fo. 89.

Frost recovered debt and damages against *B.* who was out-lawed after Judgment. and a *Capias utlagatum* delivered to the Sheriff of London. *Laborne* a Serjeant arrested the said *B.* in Fleetstreet, *Ad respondendum*, *A. Laborne* kept *B.* in his house, and then *Frost* came to *Laborne* with the Sheriffs Warrant, to arrest *B.* upon the said *Cap. utlagatum*, the which to do, *Laborne* refused, and afterwards the Sheriff suffered the said *B.* to go at large, and upon this matter, *Frost* brought his Action upon the Case against the Sheriff, and supposed that the Sheriff did arrest the said *B.* by vertue of the said *Cap. utlagatum*, and that he suffered him to go at large; and the Defendant pleaded, *Non permisit eum ire ad largeum*. The Jury found all the said special matter, and Judgment was given for the Plaintiff. For,
first,

first it was resolved, That when a man is in custody of the Sheriff by process of the Law, and after another Writ is delivered unto him to apprehend the body of him who is in his custody, immediately he is in his custody by force of the second Writ, by judgment of Law, although he make no actual arrest of him, for to what purpose should he arrest the party that is already in his custody? *Et Lex non precipit inutilia, quia inutilis labor stultus*; and the words of the Writ are not only *capias, &c.* but also *Salvo custodias, &c.* *Ita quod habeas corpus coram, &c.* and so he ought safely to keep him, *vide* 7. H. 4. 30. And the Defendant ought not to be discharged, until he had found surety to satisfie the Plaintiff by 5. E. 3. cap. 12.

Hoes Case, 40. Eliz. fol. 89 In the Exchequer.

EXecution of a Writ of Execution, as well at the sure of a common person, as at the Kings sure, is good without return of the Writ, for if a man be arrested upon a *cap. ad satisfaciendum*, the Execution is good although the Sheriff do not return the Writ, and so in all Writs of Execution, where the Sheriff doth only execute the same, as *cap. ad satisfaciendum, habere fac seisinam vel possessionem, Fieri Facias Liberat*. If the Execution be duly made, it is good, but if *cap.* in Process be not returned, the arrest is not lawful, for there the intent of the Writ is, to bring the party to answer the Plaintiff; and in case of an *Elegit*, for there the extent is to be made by Inquest, and not by the Sheriff, only; and the Writ ought to be returned, otherwise it is of none effect. In this case it was resolved, that when one hath a power of revocation, yet if he suffer any thing to be lawfully executed, as touching that, he cannot make

make any revocation: as if a man make a Letter of Attourney to another, to do any thing, before Execution he may revoke it, but after Execution lawfully done it cannot be revoked; if one, to whom another is indebted, be Outlawed, and he that oweth the mony, payeth it to the King, and the Outlary is after reversed, yet the Creditor shall recover his Debt against the party, if the goods of an Outlawed person be sold by the Sheriff upon a *cap. utlagat* and after the Outlary is reversed by Error, the Defendant shall have restitution of his goods; for the Sheriff or Escheator, is not compellable to sell the goods, but he may keep them, to the use of the King, agreeing to the Book. 10 Eliz. Dyer 363. but if a Sheriff by vertue of a *Fieri Facias*, sell the goods, and after the judgement be reversed by error, the Defendant shall not have restitution of the goods, but the value of them, for which they were sold. And the reason is, the Sheriff is compellable to Levie the Debt of the goods of the Defendant, and therefore great reason that the Sale should stand.

Semaynes Case, 2 Jac. fol. 91. Banco Regis.

THat the House of every man is to him as his Castle, and Fortrefs, as well for his defence against injuries and violence, as for his repose; that if a man kill another in his defence or per-misfortune, without any intent, yet, it is felony, and he should lose his goods and Chattels, for the great regard that the Law hath to the life of a man. But if Theeves come to the House of a man to rob or murder, and the owner or his servants kill any of the Theeves, in defence of him or his House, this is not felony, neither shall he lose any thing; any man
may

may assemble his Neighbours or friends to guard his House against violence, but he may not assemble them to go with him to the Market, or abroad, to safe-guard him against violence, and the reason of all this is, *Domus sua cuius, est tutissimum refugium*. It is resolved, that when any house is recovered by any real action, or by *Ejectione firme*, the Sheriff may break the house, and deliver seisin or possession. It was also resolved, that in all cases where the King is Party, the Sheriff may break the house (if the doors be shut) and make Execution of his Writ, but before he break the house, he ought to signify the cause of his coming, and make request to have the doors opened, *West. 1. Cap. 17.* which Act is but an affirmance of the Common Law: but if the Officer break the house, when he might have the doors opened, he is a Trespassor, *41. Ass. pl. 35.* For Felony, or suspicion of Felony, the Officer may break open the door; In all cases where the door is open, the Sheriff may enter, and make execution of his Writ, either for body or goods, at the sute of a subject, or the Lord may distrain for his rent. But it was resolved, that the Sheriff at the sute of a common person (upon request made to open the doors and denial thereof) ought not to break open the door or the house, to execute any process at the sute of any subject, or to execute a *fiery facias*, being a Writ of execution, but he is a Trespassor, yet if he do execution in the house, it is good in the Law, being done; it was also resolved, that the house of a man is not a Castle or defence for any other person but for the owner, his family and goods, and not to protect another that flyeth into the same, or the goods of another, for then the Sheriff upon request and denial, may break the house, and do execution. And this is proved by the Statute of

West.

West. 1. cap. 17. whereby it is declared, that the Sheriff may break the House or the Castle to make replevin, when the goods of another that he hath distrained, are conveyed away, to prevent the owner; but in this Case the Sheriff must demand the goods first.

Barwicks Case, 39 Eliz. in Exchequer, fol. 93.

THE Queen 28. *Die Julii, Anno 26.* demised the mannor of Sutton, to Humfrey Barwick, *tenend. sibi à die consecutionis.* It was resolved, that the same 28. day of July is excluded, and the demise began the 29. of July. It was also resolved, that an estate of freehold cannot commence *In futuro*, but ought to take effect presently in Possession, Reversion, or Remainder. A Lease for years may commence in future, but not a Lease for life, and the reason is, for that a Lease for years may be made without livery and seisin, but an estate of Freehold may not be made without livery, either in Deed, or in Law, and therefore when a man maketh a Lease for life, to commence at a day to come, he cannot make a present livery to a future estate; and therefore in this case nothing passeth, and it is all one whether it commence at a day to come, or years to come; for the distance of the times doth not make alteration in this case, but in the case of two joynt Lessees, the livery made to one is good in the name of both, for they have interest in the Land, before their entry, and livery to one in the name of both, maketh an actual possession in both, which is sufficient to support the remainder to a third person in Fee. *Vide Claytons Case*, in the fifth Book, a License to occupy Land for one year, is a Lease for one year.

H. 7. 1. in consideration of a former demise to be

be surrendered, which was false and void, is a void consideration, as to the Queen.

Goodalls Case, 40 El. Banco Regis, fol. 95.

CONDITIONS for payment of money touching inheritance, ought to be truly performed, and not covenous, if they concern a third person. The Law doth not find an assignee in Law where there is an assignee in fact. *Expressum facit cessare tacitum*; affirmed in the Exchequer-chamber upon error there brought.

Countess of Northumberland Case, 40 El. Communi Banco, fol. 97.

FITTON and the Countess of Northumberland his wife, Sir Thomas Cicil Knight, and Dorothy his wife, William Cornewalleys, and Lucy his wife, and the Lady Davers, Daughters and Heirs of the Lord Latimer, brought a (*Quare impedit*) against Hall, who pleaded a release of William Cornewalleys, *pendente breve*, and it was adjudged that this should but go in Barre only against William Cornewalleys and his wife, and the Writ should stand for others, and all shall vest in the others, because intire, and in the realty, presentment of the Lessor and Lessee is not double, for the Lessor's only traversable.

Buries Case, 40 El. in Communi Banco, fol. 98.

BETWEEN Whibster and Burie in *Ejectione firma*, a special verdict was given upon divorce between Burie and his wife, *causa frigiditytis*, and that his wife for three years after the marriage, *remansit virgo intacta, propter perpetuam impotentiam generationis in*

ro, & *quod vir fuit ineptus ad generandum*; and in this special verdict, all the examinations of the Witnesses, upon which the Judge in the Spiritual Court was moved to give his Sentence, by which the perpetual disability of *Bury ad generandum* was manifest, were read; and by which it was pretended, that the issue which he had by a second wife, was illegitimate, and this was the doubt of the Jury, and it was adjudged, that the issue of the second wife was lawful, for it is clear, that by the divorce (*causa frigiditatis*) the marriage is dissolved à *vinculo matrimonii*, and by consequence, either of them might marry after, then admitting that the second marriage was avoidable, yet it remained a marriage until it was dissolved, and by consequence, the issue that is born during the coverture (if no divorce be in the life of the parties) is lawful, *Et homo potest esse habilis & inhabilis diversis temporibus*, and Judgment affirmed in Error.

Flowers Case, 41 Eliz Banco Regis, fol. 99.

AN Indictment of Perjury upon 5 *Eliz* for giving false evidence to the great Inquest, is not within the Statute, for it must be in matter depending in lute by Bill, Writ, Action, or Information, *vide le Statute. Plus peccat author qu. m actor.*

Rooks Case, 40 Eliz. fol. 99.

THAT the Commissioners in the Commission of Sewers ought to tax all which are in damage, or in danger of damage, for non repair of the Bancks, & not only him, which hath the Land next adjoyning to the River. The Commission is grounded upon the Statute 6 *H. 6. cap. 5.* for if the Law were otherwise, great inconvenience might follow, it might

be, that the rage and force of the water might be such, that the value of the Land adjoining would not serve to amend the Bancks; and therefore the Staute would have, all in peril and which take commodity by the making of the Bancks to be contributory, for *Qui sentit commodum sentire debet & onus, & Ipsa leges cupiunt ut jure regantur.*

And notwithstanding, by the words of the Commission, authority is given to the Commissioners, to do according to their discretions; yet their proceedings ought to be limited and bounded with the rule of the Law and Reason. For discretion is a knowledge, or understanding, to discern between right and falshood, truth and wrong, shadows and substances, equity and colourable glosses and pretences, & not to do according to their wills and private affection; For a learned Man saith, *Talis discretio discretionem confundit.*

Perruddocks Case, 40. Eliz. fol. 100.

IN a *Quod permittat* between Clark assignee of Thomas Chichley, Plaintiff, and Ed. Perruddock and Mary his wife Defendants, assignee of one John Cock, for that Cock, 20. 8.bris, 10. Mariae, erected upon his freehold a house in St. Johns street so near the Curtelage of an house of Thomas Chichley, that *Domus illa super pendet, Anglice doth overhang, magnam partem videlicet 3. pedes curtilagii the Plaintiff; sic quod aque pluviales de eadem domo decedentes solum ejusdem curtilagii conterunt, & magnopere ac indies magis magisque consumunt & Devastant, ac ea ratione curtilag' præd. quolibet pluviali tempore humectat'. & inundat. existit, quod prædictus Henricus Clarke inhabitans in eodem Messuagio nullum proficuum seu easiamantum de eodem curtilagio percipere possit, ad nocumentum liberi tenement. præd. &c.* And it was resolved, that

that the distilling of the waters in the time of the Feeoffee or Assignee is a new wrong; and this Writ lyeth after request of amendment, but not before, but lyeth against him that did the wrong without request, and the action good, &c.

Windsors Case, 41. Eliz. fol. 102.

IN a *quare impedit* by *Windsor* against the Archbishop of *Canterbury* for the Church of *Buscott* in the County of *Barke*: It was adjudged, that if two have title to present by turn; and the one present, who is admitted, instituted, and inducted; and afterwards is deprived for Crime, Heresies, &c. yet that Patron should not present again, but that shall serve for his turn. So likewise if he present a meer *Latus*, which was admitted, instituted, and inducted, although it be declared by sentence, that he was incapable, and therefore void *ab initio*, yet because the Church was full untill the sentence declaratory be pronounced, yet that shall serve for his Turn. But when the admission and institution are meerly void, then that shall not serve for one Turn, as if a presentee be once admitted, instituted, and inducted, but hath not subscribed to the Articles, &c. according to the Statute of 13. *Eliz.* by which in this case the admission, institution, and induction are void, 23. *El. Dier pl. ult. acc.*

Hungatts Case, 43. El. Com. Banco, fol. 103.

Hungatt brought an action of debt upon an Obligation against *Mese* and *Smith*; the condition was to perform an award between the Plaintiff on the one party, and the Defendants on the other; *Ita quod arbitrium præd fiat & deliberetur utrique partium*
Q² præd-

præd. before such a day, the arbitrament before the day was delivered to the Plaintiff, and to *Mese*, but not to *Smith*, Judgment was given against the Plaintiff. It was resolved, that if two be of one party and two of another, and the words are *Ita quod de liber. utriq; partium* That the delivery of the arbitrament to one of the one part, and another of the other party is not sufficient; For the party is to be intended of the whole party, for one is as well within the penalty and danger of the Obligation as the other; and *uterq;* is taken sometimes *Discretive*, sometimes *Collective* *Secundum subjectam materiam*; but here it is taken *Collective*.

Bakers Case, 42 Eliz. fol. 104.

IF a Plaintiff in evidence shew any matter in writing or record, or any sentence in the Ecclesiastical Court, whereupon Law doth arise, and the Defendant offer to demurr in Law upon the same, the Plaintiff cannot refuse to joyn, or wave his evidence; and so on the other party, and the reason is for that matter in Law, shall not be put in the mouth of Lay- but the King in this case is at liberty.

Bulstons Case, 40 El. in communi banco, fol. 104.

IT was adjudged, that if a man make Cony-boroughs in his own land, and the Conies encrease to so great a number, that they destroy his Neighbours ground adjoining; The Neighbours may not have an Action of the Case; for presently when the Conies come into his Neighbours ground, he may kill them, because they are *feræ naturæ*. And in this case it was resolved, that none may newly erect a Dove-house, but the Lord of a Mannor; any if any
do

do, he may be punished in the Leet; but no Action of the Case lyeth for any particular man, for the infiniteness of actions that might be brought And of this opinion touching the new erecting of a Dove-cote, was Sir Roger Manwood, chief Baron, and the Barons of the Exchequer in the Exchequer Chamber.

Aldens Case, 43 Eliz. com. banco, fol. 105.

ANcient Demise is a good plea in an Ejectione firmæ, although it is not in trespass, because by indentment the freehold may come in debate, and the interest of the Land is bound; ancient demesne is extendable upon a Statute by *Elegit*, but in an assise by tenant by *Elegit*, ancient demesne is a good plea. 22 Ass. Pl. 45.

Sir Henry Constables Case, 34 El. in banco te roy fo. 106.

NOthing shall be said *Wreccum maris*, but such goods only, which are cast or left upon the Land by the Sea; *Flotsam maris*, is when a ship is drowned, or otherwise perish, and the goods float upon the Sea; *jetsam maris*, is when a ship is in peril of drowning, as for disburthening thereof, the goods are cast into the Sea, and after notwithstanding the ship perish. *Lagan vel potius Ligan*, is when the goods so cast out of the ship, and the ship perish, and such goods are so ponderous, that they sink to the bottom, and the Mariners to the intent to find them, bind thereunto a Poy or a Cork, or other such thing to find them again; *Et dicitur Ligan à Ligando*, and none of these words which are called *Flotsam*, *jetsam*, or *Ligan*, are called wreck, so long as they remain in or upon the Sea; but if any

of them be cast upon the land by the Sea, then it is said to be wreck, and by the Statute 15 R. 2. ca. 3. the Lord Admiral shall not have consuance or jurisdiction of wreck of Sea; but of the other three he hath; for wreck is when the goods are cast upon the land, and so within some County, whereof the Common Law may take Consuance; But the other three are upon the Sea, *Magis proprie dici poterit Wreccum, si Navis frangatur & ex qua nullas vires evasit, & maxime si dominus rerum submersus fuerit, & quicquid inde ad terram venerit erit domini Regis;* wreck may by prescription belong to the Lord of a Mannor. It was resolved also, that the soyl upon which the Sea doth flow and reflow; *scil.* between the high water mark, and the low water mark, may be parcel of the Mannor of a Subject. 16 El. Dier. And it was resolved, that when the Sea doth flow, *ad plenitudinem maris,* the high Admiral shall have Jurisdiction of every thing done upon the water, between the high water mark, and the low water mark, as felony, &c No proof is allowable by the Law, but the verdict of twelve men; part of the goods were wreck, and part not, & damage assessed intirely, *ergo* judgment given for the Defendant. The King shall have *flot sam* upon the Sea, because within the ligeance of the King.

Foxleys Case, 43 El. Banco Regis, fol. 109.

IT was resolved, if a Felon steal any goods, and leave them in a Mannor or Town, or in his house, or in the house of another, or hide them in the earth, or any other secret place, and afterward fly, these goods are not forfeited, nor waife-goods in the Law. for waife is where a Felon in pursute, waveth or leaveth the goods, or for fear to be taken, thinking that pursute was or is made, having the goods with him in his

his possession, flyeth away and leaveth the goods; In these cases the goods shall be said waved in Law. But if he had not the goods with him, when he did fly being pursued, or for fear of being apprehended, the goods are not waved, nor forfeited, but the owner may take them again when he will, without any fresh sure. But if the Felon in his flying wave them, the goods are forfeited by the Common Law; If the Felon upon fresh sure be not attaint, at the sure of the owner of the goods. And the reason that wave is given to the King, is for default of the owner, that he doth not make fresh sure after, for to apprehend the Felon. Wherefore the Law doth impose the penalty on the owner.

Bona fugitivorum are the proper goods of him that flyeth away for felony; But it is to be observed, that if a man fly for felony his goods are not forfeited, until they be found by indictment or otherwise lawfully found of Record upon his acquittal, that he fled for the felony, they cannot be claimed by prescription, because the things forfeited by matter of record, cannot be claimed by prescription.

But waife, stray, treasure-trove, wreck of the Sea, &c. which things may be gained by usage without matter of record, there a man may prescribe to have *Bona & catalla felonum*: in some cases, *Bona & catalla felonum* shall be forfeited by conviction, and sometimes without conviction, but alwayes when any forfeiture is of any goods of Felons, it ought to appear of Record, and that is the cause that such goods cannot be claimed by prescription.

Prodeadenda, are goods which cause the death of a man by misadventure, and are not forfeited, until they be found of Record, & therefore cannot be claimed by prescription, & the Jury that presents or finds the death, ought to find and apprise the *Prodeadendum* also,

also *omnia quæ movent ad mortem sunt deodanda*, Bona & Catalla in exigendo positorum, are when any be appealed or indicted of felony, and withdraw or absent himself, for so long time as an exigent is awarded against him for his absenting (which is a flying away in Law) he shall forfeit all his goods and chattels which he had at the time of the exigent, and after be found not guilty, 22 Lib. Ass. Look the Statute 21 H. 8. cap. 11. Concerning goods waved, and for restitution, &c.

Mallaries Case, 43 Eliz. fo. 111.

Rendring Rent to one and his Heirs, and to one or his Heirs, are all one; but a Feoffment *tenendum* to one or his Heirs, is but during the life of the Feoffee; *Nemo potest plus juris in alium transferre quam ipse habet*: this case consisteth much upon attainments. *Vide le case.*

Wades Case, 43 Eliz. in communibanco, fo. 114.

A Man was bound to pay 250 l. *Legal. monet. Anglie*, on a day certain; the last time of the day, that so much money can be numbred is the best time, so that it be before the setting of the Sun, and the most convenient time by Law, that both parties may meet: five shillings in Spanish money, and two pistolets in gold were tendered. It was resolved, that the Spanish silver was lawful money of England by Proclamation, in tempore Philippi & Maria, and so French Crowns; for the King by his Prerogative and Proclamation, may make any forein Coyn lawful money of England: That if a man tender more than he is bound to pay, it is good, *Omne majus continet in se minus*, That the tendring of 250 l. in baggs without

without shewing or numbring the same is good tender, if the truth be that there was so much, *Vide Winters case*, if there be any counterfeit mony in the same, yet if the party then accept the same, he cannot compel the party to change it; or if it be rent, or for non-payment a re-entree, yet the once acceptance is good, and the lessor may not re-enter.

Foliambes Case, 43 Eliz. fo. 115.

IN a Writ of *Estrepement*, the Sheriff may resist them that will make waste, or cut down Trees, and if he cannot otherwise, he may imprison them, and may make warrants to others, and he may take *Posse comitatus* for his aid. A Writ of *Estrepement* lyeth in the Action of Waste, as well before Judgment as after.

Olands Case, 44 Eliz. Banco Regis, fo. 116.

A Feme Copy holder *Durante viduitate*, sows the Land, and takeith Husband, the Lord shall have the Corn; for although her estate was incertain, yet it was determined by her own act; so if Lessee at Will sow the Land, and determine the Will, but if Baron and Feme at Lessees during the coverture, and the Baron sow the Land, and they are after divorced, *causa præcontractus*, the Baron shall have the Enblements, because this is the Act of the Court.

Pynn ls Case, 44 Eliz. fo. 117. com. banco.

Prannel brought an Action of Debt upon a Obligation against Cole, of 16 l. for payment of 8 l. 10 s. on the 11th. of Nov. 1600. The Defendant pleaded,

pleaded, that at the instance of the Plaintiff before the said day he paid him 5. l. 10. s. and it was resolved by all the Court, that the payment of a lesser summe in satisfaction of a greater summe, cannot be satisfaction for all, so that by no possibility a meaner summe may satisfie the Plaintiff of a greater; but the gift of an Horse, Cow, Robe, &c. in satisfaction is good.

But in this case it was resolved, That the payment of a parcel, and acceptance thereof before the day, in satisfaction of all, is a good satisfaction, in respect of the circumstance of time; for peradventure, parcel of that before the day, may be more beneficial unto him than the whole summe of money at the day, and the value of satisfaction is not material, for if I be bound to pay you 10. l. at *Westminster*, and you request me to pay 5. l. at *York*, and you will accept the same in full satisfaction of the 10. l. this is a good satisfaction in respect of the place, but in this case, the Plaintiff had judgement for the insufficient pleading; for he did not plead that he had paid 5. l. 10. s. in full satisfaction, (as by Law he ought) but pleaded the payment of part generally, and the Plaintiff accepted the same in full satisfaction, and alwayes the manner of the tender, and of the payment shall be directed by him that maketh the tender and payment, and not by him that accepteth it.

Edriches Case, 1 Jacobi, Com. Banco, fol. 118.

A Rent charge is granted to B. for the life of C. the Grantor leaseth for life to D. the remainder in Fee to E; C. and D. dyes, B. distrains E. for all arrears, this is good by the Statute of 32. H. 8. cap. 37.

Whelpdales

Whelpdales Case, 2 Jacobi com. banco, fol. 119.

IN Debt brought against one joint-Obligor the Defendant pleads *Non est factum*, adjudged for the Plaintiff.

1. Resolved, he may plead in abatement of the Writ, but not *Non est factum*, for every one is obliged in the intirety; therefore if Debt be brought against both, and one is out-lawed, the other who appears shall be charged with all.

2. If a Deed be avoidable by plea, he shall not plead, *Non est factum*.

3. If a Deed be made void by Statute, he shall not plead *Non est factum*, but shall avoid it by plea; but if a deed by matter *ex post facto*, become not his deed, he plead *Non est factum*, as if one deliver a Deed to deliver over to I. S. who refuseth, &c.

Longs Case, 2 Jacobi, banco Regis, fol. 120.

EXception to the Inditement of Murder, the inditement was taken, *Infra libertatem villa de C*; and C where the Torte is done, is not said to be within the Liberty. Respons. That to Inditements certainty to a certain intent in general sufficeth, and not to every particular intent, for that is, *nimia subtilitas*: and it shall be intended, that the *Villa* of C is within the liberty of C the Indictment is, *Quod dedit vulnus super anteriorem partem corporis subter Mammillam*, where it should be *Mammillam*. Resolved, that false latin shall not quash an Indictment, if the word be sensible; and these two words are good Latine: also this is superfluous, for *Super anteriorem partem corporis*, is sufficient, and shall be intended the Trunk betwixt the Neck and Thighs. 3. *Vulnus*, where

where it should be *Plaga*, over-ruled, because *Synonyma*. 4. *Le depthe*, is not shewed, it was said, that it did penetrate all his body, whereby it appeareth, that it was mortal. 5. It is said, that the wound did penetrate his body, and not the bullet; this is significant enough. 6. *Percussit* wanteth, and for this cause the Indictment was quashed, for in all cases of death this ought to be, except in case of poisoning, and for this last errour the Outlary was reversed, and H. D. was discharged.

Saffins Case, 3 *Jacob*. fo. 123. com. banco.

A Man maketh a Lease for years to commence after the end or determination of a former Lease *In esse*. The first Lease endeth, the second Lessee doth not enter, but he in reversion entreteth, and maketh a Feoffment, and levyeth a fine with Proclamations, and five years pass without entry or claim of the second Lessee. If this fine be a Barr, was the Question, and it was resolved to be a Barr, for the Statute of 4 H. 7. c. 24 speaks of interest, and a Lease for years is an interest within the Statute, so of Tenant by *Elegit*, &c.

De Libellis famosis, 3 *Jac*. fo. 125.

A Libel may be made as well against a private man, as against a Magistrate, *Non refert*, whether the Libel be true, or whether the party be of good fame, or ill fame, for it inciteth all the same family, kindred, or society to revenge, and so tendeth by consequence to the effusion of blood. It was resolved in the Star-Chamber, 44 *Eliz. Hallywoods Case*, that if any find a libel, and would preserve himself out of danger if it be against a private man, the
finder

finder may either burn it, or presently deliver it to a Magistrate, but if it concern a Magistrate or publick person, then he ought to give it to a Magistrate. A Libel may be as well by words, *Verbis aut cantilenis*, as writings, and by pictures or Ignominious signes, as Gallows, &c. The punishment is by Indictment, as in the Star-Chamber.

Palmer's Case, 8 Jac. 126. *binco regis*.

THE Gardian in Chivalry shall have the single value of the Marriage of the Heir without tender, otherwise the Heir may defeat the Lord by Marriage, or go beyond the Sea, and so prevent the Lord of any tender, if it were requisite.

Caudrey's Case, 33 Eliz. in *Trespass*.

THE Jury found the Statute of 1 Eliz. c. 1. and c. 2. and that the Plaintiff was deprived for Preaching against the Book of Common-Prayer; by the Bishop of London, *una cum assensu*, &c.

Resol. 1. The deprivation was good for the first offence, because the Act of 1 Eliz. for Uniformity of Common-Prayer doth not abrogate 1 Eliz. for Ecclesiastical Jurisdiction without negative words, and by an expresse proviso the Jurisdiction of the Bishop is saved.

Resolv. 2. That sentence given by the Bishop by assent of his Collegues, ought to be allowed by our Law.

Resolv. 3. That Commissioners shall be intended Subjects born, &c. *Stabimur presumptioni*, &c. Also it is found that the King authorized them, *secundum formam Statuti*.

Resolv. 4. The Act of 1 Eliz. for Ecclesiastical Juris-

Jurisdiction was only declaratory; for the King being an absolute Monarch, and head of the body politick, had plenary power to minister justice to his Subjects in Causes Ecclesiastical and temporal. See *Circumspectè agatis*, 13 E. 1. and *Articuli Cleri*. 9 E. 3. *Reges sacro oleo uncti sunt Spiritualis jurisdictionis capaces*. See there diverse Judgments, Laws, and Acts of Parliament, cited to prove the Kings supremacy in Causes Ecclesiastical.

The End of the Fifth Book.

THE



THE SIXTH BOOK.

Where Services intire shall be Apportioned.

*Bruertons Case, 36 Eliz. In the Court of Wards.
Fol. 2.*



LORD and Tenant of the three Acres, by Homage, Fealty, a Hawk and Sute of Court; the Tenant makes a Feoffment of one Acre, the Feoffee by the common Law shall hold by all intire services, annual and casual, and the Statute of *Quia emptores Terrarum*, doth not extend to intire services, but by the Statute of *Martebr. c. 9.* the Feoffees shall make but one Sute, and he who doth it shall have Contribution against the others, if they are severally infeoffed; otherwise, if jointly.

2. Intire services shall be multiplied by the Act of the Tenant, and extinct by the Act of the Lord, as if he purchase part.

3. By Act of the Lord, intire service for his private benefit is extinct; otherwise, if it be for the publick good, for works of Charity, Devotion, or Administration of Justice.

4. If part comes to the Lord by Act in Law, yet the

the intire service remains, except in case where Contribution is to be made, for the land shall not contribute.

5. If part comes to the Lord by Act in Law, and of himself as by recovery in a *Cessavit*, all the intire services are gone.

Where the Parol shall demurr for the nonage of the Demandant, and where the Tenant shall have his Age.

Markals Case, 35 Eliz. com. banco, fol. 3.

IN a Formedon in the remainder by an Infant of a remainder limited to his Father, and his heirs, the Tenant cannot pray, that the Parol may demur, but in a Formedon in the reverter he may: In actions auncestrel, the Tenant may pray that the Parol may demur, because a right only descends to the Infant, and the Law will not suffer him to sue, for fear that he may lose for want of understanding, but in possessory Actions he cannot, because then every one will put Infants out of possession, and it would be mischievous if they should not regain their possession untill full age: So it is in all Writs where the cause of actions happens in the time of the Infant, And as to actions auncestrel, they are of two sorts Droiturel and possessory, the first is where a right only descends from the Auncestor, and the Infant ought to lay the explees in the Auncestor, and there the Tenant (without plea pleaded) may pray that the Parol may demur, but if the Auncestor were never in possession (as in this case he was not) and the Infant himself is the first in whom it vests, there

there (without plea pleaded) he shall not pray that the Parol may demurre : but if a Right discend from an Auncestor who was in possession, although the Action doth not discend, the Tenant may pray that the Parol may demurre, as if *Non compos mentis* alien and dyc : In actions Auncestrel possessory, the Parol shall not demurre without plea : but if at the common Law the Tenant had pleaded a feoffment of the auncestor, then he may pray, &c. but the Statute of *Glocester*, c. 2. aideth that in the Writs of *Cosinage*, *Besafiel*, and *Aiel*, but this extends not to other actions, in a *Formedon* in the descender, where an Infant recovers but a limited estate, the Parol shall not demur without plea, in an assize, or assize of *Mortdaucester*, the Parol shall not demurr becaus the Jury is to appear the first day, and try all things.

The Statute of *Westm.* 1. c. 46. Age is taken away in entry upon disseisin, where fresh sute is made, but an Infant shall have his age in all real Actions, where he is in by discent, and the Action is not founded upon his own wrong, except in *Nuper obiit*, and *Partitione faciendas*, where both are in possession or attaint, for the mischief of the death of the Perry Jury: The Statute of *Westm.* c. 40. Ousteth the age of the vouchee in *cui in vita*, and *sur cui; in vita*, although that the Tenant will answer, if the parol ought to demurr, yet the Court ought to award that the parol shall demurr.

Sir John Molyns Case, 40 Eliz. in Scaccar. fol. 5.

King Edward the third, Lord Abbot of *Westminster*, Mesne, and C. Tenant: C. is attainted of Treason, the King grants to Sir Jo. Mo. *Tenendum de nobis & aliis capitalibus dominis feodi illius per servitia,*
R
&c.

&c. the Mesnalty is revived. *Object.* 1. That the tenure shall be *Per servitia inde debita*, at which time no service was due to the Mesne. 2. An express tenure of the King is limited, and it cannot be immediately holden but of one. To the first it was answered, that there are sufficient words to renew the Mesnalty, because the intention of the King appears to be so; and it is reasonable, that the Mesne who offended not, should not suffer loss. 2. It shall be holden immediately of the Abbot, and mediately of the King.

Whealers Case, 43 Eliz. in Scaccario, fo. 6.

THE King grants Land *Tenendum* by a Rose, *Pro omnibus serviciis*, this is a Scoccage in chief, and the tenure shall be by fealty and a Rose, and (*Pro omnibus*) is to be intended of other services which the Law doth not imply.

Resolutions and Diversities when a Bar in one action shall be a Bar in another.

Ferrers Case, 41 Eliz. com. banco, fo. 7.

IF one be barred by plea to the Writ, he may have the same Writ again; if by plea to the action of the Writ, he may have his right action: If the plea be to the action, and he be barred by Judgment upon demurrer, confession or verdict, in personal action it is a Barr for ever, and in real action he is put to a Writ of higher nature, as Barr in assise barreth one in Entry in nature of an assise, but he may have an assise of Mortdauncester, &c. But Barr is not perpetual, if those who are barred have

have not the meer right, therefore the Heir in tail who is barred, shall have the same action; so of the successour of a Parson, if he doth not pray in aid of the Patron and ordinary; he who lost by default before the Statute of *Westminster*, 2. cap. 4. was put to a Writ of Right, and if he could not have this Writ, he was without remedy: In case where a Writ of Entry in the post lyeth now, no remedy was before the Statute of *Marlebridge*, cap. 29. but a Writ of Right. See there divers inconveniencies which issue upon the breach or alteration of the antient and fundamental Rules of the Common Law: *Interest Reipublicæ, ut sit finis litium.*

*Where a Writ shall be brought by
Journeys accompt.*

Spencers Case, 45 Eliz. com. banco, fol. 9.

IF a Formedon abate for undue summons, the demandant may have another by Journeys accompts.

1. *Resol.* If a Writ abate by default of the demandant himself, he shall not have another Writ by Journeys accompts; otherwise it is, by default of the Clerk or Sheriff, as in this case: if a Writ abate for non-tenure of all, he shall not have, &c. But if a Præcipe abate for non-tenure of parcel, he shall have another; so if it abate for joynt-tenancy of part of the demandant, he shall not have a new Writ because he had notice, otherwise it is of the part of the Tenant: And this Writ shall be alwaies betwixt the parties to the first Writ, and of the same quantity of Acres. A Judicial Writ shall never be sued by Journeys accompts, because it shall never abate for form. 2. The second Writ is *quasi*, a continu-

ance of the first Writ, therefore all pleas which relate to the purchase of the Writ shall be pleaded from the purchase of the first Writ, and costs of the first Writ shall be recovered, 32 E.3. Journeys accompts, 16. 15. dayes were allowed.

Gentlemans Case, 25 Eliz. concerning Judges of Courts, fol. 11.

IN the Hundred Courts the Sutors are Judges, in the Court of Pypowders, the Steward is Judge; In a Lect, the Steward is Judge: In a Court Baron, the Sutors which are by the Common Law are Judges, *Rex sectatoribus Curie, &c. Vobis mandamus, &c. ad iudicium reddendum, &c. procedatis*: but in Re-disseisin the Sheriff is Judge, by the Statute of Merton, c. 3. and in the Tourne.

Morries Case, 27 Eliz. Com. Banco, fol. 12.

IT was adjudged, that after the Act of 28 H. c. 1. although jointenants be compellable to make partition by Writ, as well as Copartners, yet they may not make partition by words, as Copartners may do by the Common Law. If two joint-tenants make partition by Writ, the warranty remaineth; otherwise it is, if it be by deed by consent.

Cases of Pardon, 29 Eliz. fol. 13.

Burton Parson of Isbock in Leic. was deprived Anno 12 El. for committing Adultery, and after by the general pardon 2 Apr. 13 El. the offence of Adultery (*inter alia*) was pardoned, before the 14 of February then last past. And it was said, that before the pardon, that *crimen adulterii præd. transiit in rem iudicatam*

judicatam, and therefore the sentence should remain in force; And therefore until the sentence were reversed, the deprivation was in force. But it was resolved, that *Burton* by vertue of the said pardon is become Parson again, without any sentence declaring the said deprivation to be voyd: for by the pardon, the Adultery which was the cause of the sentence is discharged; and by consequence, all that which did stand or depend upon the same foundation is, also discharged, *Vide 20 El. Dyer.*

A. was bound in a Statute of 20 *li.* to B; B. sued Execution, and the Lands of A. were delivered in Execution; and after, B. maketh Defeasance to A. by Indenture, that if A. do pay to B. 8 *li.* at a certain day, that then the Statute to be voyd; and it was adjudged, that although the Statute was executed, yet the Defeasance of the Statute was sufficient in Law to defeat as well the Statute, as the Execution thereof; For the Statute is the foundation of all, and if that be defeated, all that is builded on the same, shall be defeated also, 20. *ass. pla. 7.* Burglary was excepted out of the general pardon of 28 *Eliz.* by that the attainder of Burglary is excepted; for the offence remains after judgment, and is the foundation of it.

Arundels Case, 36 Eliz. Banco Regis, fol. 14.

AN Indictment of murther in King-street in W. and the Visne from W. and it was vitious, for it ought to be from the most certain place, that is the Parish; for W. being a City it shall be intended that it is greater then the Parish, and therefore a new *Venire facias* was awarded.

Treports Case, 36 Eliz. Banco Regis, fol. 14.

A Tenant for life, remainder in fee to B. both by Deed indented, joyn in a Lease to *Treport*; the Question was, Whether the same shall be adjudged in Law, the Lease of both of them or not; And it was resolved, that it was the Lease of A. during his life, and the confirmation of B. and after the death of A. it was the Lease of B. and the confirmation of A. and because the Plaintiff had declared of a joynt-demise of A. and B. it was adjudged against the Plaintiff in an *Ejectione firmæ*. If Tenant for life, and he in remainder joyn in a Lease, rendring Rent, Tenant for life shall have the Rent during his life.

Edens Case, 37 Eliz. Banco Regis, fo. 15.

Riens passa, By Letters Patents shall be tryed where the Land is, not where the Patent bears date, for the Patent is not traversed; but the effect of the issue is, Whether the Queen had the said Land to the Grant or not?

Colyers Case, 37 Eliz. com. banco, fo. 16.

ONe deviseth to his daughter for life, and after to his brother, paying 20 s. to I. S. the brother had fee for the summe to be paid by him, for otherwise he may pay the 20 s. and dye without satisfaction; but if the payment be to be made out of the profit of the Land, he shall have but for life, for there he can be at no prejudice.

Wylde

Wylde's Case, 41 Eliz. Banco Regis, fo. 16.

A Man deviseth Lands to the husband and the wife, and to the children of their bodies; The Question was, Whether they have an estate for life, or an inheritance in tail? And it was resolved, that if they had children at the time of the demise made, then they had but an estate for life; but if they had no children, then they had an estate of inheritance in tail.

Sir Edward Cleers Case, 42. Eliz. fo 17.

A Man is seised of three Acres of Land holden *in capite*, and maketh a Feoffment in fee of two of them, to the use of his wife for her life; and after maketh a feoffment by deed of the third Acre, to the use of such persons, and of such estate and estates as he should limit and appoint by his last Will in writing; and afterwards by his last Will in writing, he devised the said third Acre to one in fee; and if this devise was good for all the third Acre, or not, or for two parts thereof, or void for all, was the Question: And it was adjudged, that the devise was good; For the Feoffor by his last Will limited the estates according to his power, reserved to him upon the Feoffment, the estates should take effect by force of the Feoffment, and the use is directed by the Will; so as in this case the Will is only directory: But if he declared his Will by writing, without any reference to his authority or power, as owner of the Land, and to limit no use according to his power. In this case the Land being holden *in capite*, the devise is good for two parts, and void for the third part. If a man make a Feoffment in fee of Lands *in capite*, to

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the use of this last Will, although he Devise the Land with reference to the Feoffment, yet the Will is voyd for a third part ; for a Feoffment to the use of his last Will, and to the use of him, and his heirs is all one:

In this case when the party had conveyed two parts to the use of his wife, by his Act executed he cannot as owner of the Land devise any part of the residue by his Will, and therefore because he hath not an election as in the case put before, whether to limit according to his power, or devise the same as owner of the Land, for in the case at Barr as owner of the Land, (having conveyed two parts to the use of his wife,) he cannot make any Devise. The Devise of necessity must inure a limitation of the use, otherwise the Devise should be altogether voyd.

Packmans Case, 37 Eliz. Banco Regis, fol. 18.

Wilson brought an Action upon the Case upon a Trover against *Packman*. The case was thus ; A man dyed Intestate, and the Ordinary committed the Administration to a Stranger, and after the next of kindred of the Decedent sued out a Citation in the Court Christian, to have it repealed, and (*pendente lite*) the administrator to defeat the Plaintiff selleth the goods of the decedent to the defendant, and after the Letters of Administration were revoked by Sentence, and the first sentence annulled & made voyd, and the administration granted to the Plaintiff. And it was resolved, that the action did not lye ; and in this case the diversity was holden, between a surety by Citation, for to countermand or revoke the former administration, and an appeal, which is alwayes a reserving of a former sentence, for an appeal doth suspend the former sentence; otherwise, of a Citation.

And

And in this case because the first Administrator had the absolute property of the goods in him, without question he may sell them to whom he will, and although the Administration be revoked afterwards, yet that cannot defeat the Sale. But if the sale or gift be by covin, it is void against Creditors by the Statute of 13 *El.* but it is good against a second Administrator. And if an Administrator waste the goods, and afterwards the Administration is granted to another, yet every debtor shall charge him in debt. An Administration may be granted upon condition, and whatsoever the Administrator doth before the condition broken, is good.

Gregories Case, 38 El. Banco Regis, fol. 20.

V*erba æquivoca & in dubio posita, intelliguntur in digniori & potentiori sensu, secundum excellentiā,* as if the speech or writing be of J S. generally, it shall be intended of the father, where the father and son are both of a name; and if it be of two brothers both of a name, it shall be intended of the eldest, for these are more worthy; so where the Statute of 4. & 5. *Pb l. & Ma* speaketh in any Court of Record, it shall be intended of the four Courts at *Westminster*, because the Kings Attorney is attendant there.

Michelborns Case, 38 Eliz. Banco Regis, fol. 21.

THE Court of Marshalsea, doth only hold plea of actions of trespass, within the verge, if the one of the parties be of the Kings household, and in contracts and Covenants, where both parties are of the Kings household, and of none other actions, nor persons, by Act of *Articuli super Charta* 28. *E. 1.*

Butler

Butler and Goodalls Case, 40 El. Banco Regis, fol. 21.

IT was resolved upon the Statute of 21 H. 8. that a Parson of a Church ought to stay and be Comorant upon his Rectory (*viz.*) upon the Parsonage-house, and not in any other house, although it be within the Parish; but lawful imprisonment without coven, is a good excuse of non residence: also if there be no Parsonage house, for *impotentia excusat Legem*; also sickness without fraud, if the patient remove by advice of his Counsel in Physick, *bona fide*, for better air, and recovery of his health.

Ambrosia Gorges Case, 40 El. fo. 22. in Cur. Wardorum.

IT was resolved, that the Father shall have the Wardship of his Daughter and heir apparent, so long as she continueth his heir apparent; but when the Father hath issue a Son, then she shall be in ward to the Queen; for then he is heir apparent, and not the Daughter. *Ambrosia* was Daughter of Sir Arthur Gorge, by Douglas, Daughter and heir of Viscount Bindon, and was married to Francis Gorge, which Francis dyed, when *Ambrosia* was of ten years of age. It was resolved also, that the Queen notwithstanding the said marriage, should have the Wardship of the said *Ambrosia*; for it was not a compleat marriage, because to every marriage there ought to be a consent; For *Consensus non concubitus facit matrimonium, & consentire non possunt ante annos nobiles*. And upon conference had with the Civilians, it was agreed after such a marriage, if the Husband and the Wife marry again, it shall not be counted Bigamie, and 30 E. 1. tit. Gard. 156. if the Ancestor marry his heir *infra annos nobiles*, and die; the Lord shall recover

Lib. 5. *Marquess of Winchesters Case.* 251

recover the body of the Infant, because the heir may disagree; It was agreed, that the Grandfather shall not have the wardship of the Son within age, the Father being dead in his life-time.

*Marquess of Winchester his Case, 41 Eliz.
fo. 23. in Banco Regis.*

BY the Law it is not sufficient, that the testator be of memory (when he makes his Will) to answer ordinary and usual questions, but he ought to have disposing memory, so as he is able to make disposition of his Lands with understanding and reason. And this is such a memory which is called safe and perfect memory, otherwise a prohibition lyeth at the common Law generally, to stay all the proceedings in the spiritual Court, as the Probate of the Will, &c. until this suggestion be tryed at the common Law.

Reads Case, 42 Eliz. Banco Regis, fo. 24.

IN trespass the Descendant makes title, for that A. W. was seised in fee, and leased to him; the Plaintiff maketh title by descent, and traverseth the Lease, and good, for it may be true, that A. W. was seised, and yet that a descent was cast to the Plaintiff, therefore the Lease is most material to be traversed.

Helyars Case, 41 Eliz. Banco Regis, fo. 24.

IN a Replevin the Defendant avoweth by grant of a term by I. A. to S. from whom he claimeth: the Plaintiff pleads in Barr, that I. A. married T. who by a former deed granted the term to the Plaintiff, and

and traverseth the grant made to S. and vitious ; for he who claimeth by the first assignment shall not traverse the second, but he who claims by the second shall traverse the first. But the first Feoffee shall traverse the last feoffment, and the last feoffee shall not traverse the first feoffment, because fee may be gained by disseisin after the first feoffment, but a Lease for years cannot.

Ruddocks Case, 41 Eliz. fo. 25. Com. Banco.

IN replevin against six, the Plaintiff recovers, the Defendants bring error, the Plaintiff pleads the release of one of them, not good ; Where diverse are to recover a personal thing, the release or default of one bars all, but not where they are to discharge themselves of a personality, if they are compelled to joyn, as in error an attain ; otherwise in Outlawy because not compellable to joyn, for where they are to discharge themselves, they have no joyn interest, and although they shall have their damages against it shall be intended that they paid them of their several goods, otherwise it may be doubted if Execution had been made of goods, which they have joynly.

Sharps Case, 41 Eliz. fo. 26. Com. Banco.

IF a man make a Feoffment, in Fee, or a Lease for life, and say to the Feoffee (being either on the Lands, or within the view) *enter into this Land and enjoy the same*, according to this deed, &c. this is good livery ; but the delivery of the deed upon the Lands without any further ceremony or saying, doth not amount to a Livery. *Throughgoods Case. 9 Jacobi*, in ninth Book. The actual delivery of

a writing, sealed to the party without any words, is a good livery, but not a livery of seisin, although the Party be upon the ground.

If I deliver a Deed unto the Feoffee or Lessee of the Messuage, mentioned in the Deed in the name of seisin of the said Messuage, and of all the Lands, Tenements, &c. in the same contained, or other such like words, without any ceremony, or act done, this is a good seisin.

The Cases of Souldiers, 43 Eliz. fol. 27.

THe Statute of 7 H. 7. cap. 1. and 3. H. 8. cap. 5. against Souldiers who run away, are acts perpetual; for the word King includeth all his succession, and a gift to the King inureth to his Successors.

Vicount Mountagues Case, 43 Eliz. in Scaccar. fol. 27.

Vicount M. with License to the K. suffers a recovery to B. and D. to uses with power of revocation and limiting of new, and 'revokes and limits new uses, the King shall have no fine for alienation.

2. Resolved, if the King doth license to alien to one, and alienation is made to the use of another, the King shall not have a fine, for although that the King was not informed of his Tenant, yet the use is executed by the Statute of 27 H. 8. which can do no wrong, and the proviso in the Statute, that a fine shall be paid for executing of uses, is to be intended of uses raised by Covenant, or declared upon a Fine, Feoffment, &c. when no License of alienation is obtained.

2. Al-

2. Although that by revocation, and new limitation of uses, the Tenant of the King be altered, yet no fine is due, because all ariseth out of the Estate B. and D. which was made with License.

Greens Case, 44 Eliz. Banco Regis, fol. 29.

TENANT for life, of a Mannor to which an advowson is appendant, the remainder in fee to I. S. presenteth one, who at the sute of the Tenant for life is deprived for not reading the Articles; but no notice is given to the Patron, the Queen by lapse presenteth the Defendant; Tenant for life, and his incumbered dye, he in the remainder presents the Plaintiff *Green*, who recovereth.

1. Resolv. Although the Patron were party at the sute, and so had notice, yet lapse shall not incur without notice given by the ordinary, as the Statute speaks, and the notice ought to be special, that he did not read the Articles, and therefore was deprived, and general notice is not sufficient.

2. The Church is void, *Ipso facto*, by the Statute of 13 *Eliz.* without deprivation.

3. If the Queen present *Ratione Lapsus*, where she is Patron, this is void; *a fortiori*, when she had no title at all.

4. The Patron is not put to a *Quare impedit*, by presenting him who read not the Articles, nor by collation; but, by collation of him who had right to collate, the Patron is put out of possession.

4. The Queen may be put out of possession of an advowson, because it is transitory, but she cannot be put to a Writ of right of advowson, for none can gain the inheritance from her by wrong.

Boothies Case, 3 Jacobi, com. banco, fol. 30.

THe condition of an Obligation, is to deliver an Obligation to the Obligee, and to acknowledge satisfaction, it must be done in convenient time, for acts transitory to be done to the Obligee, although a place be appointed, shall be done in convenient time, and acts of their nature local, ought to be performed in convenient time, if concurrence of the Obligor and Obligee be not requisite. Also here the delivery of the bond being transitory, and the acknowledging satisfaction such an act as may be performed in the absence of the Obligee, they ought to be done in convenient time, without request: but if the act be local, and their concurrence necessary, the Obligor hath time, during his life, if not hastened by request: If the concurrence of the Obligor and a stranger be necessary, it ought to be done in convenient time, if concurrence of the Obligee and a stranger, it ought to be hastened by request: and alwaies, if the Act to be done is not for the benefit of the Obligee, but a labour to the Obligor, or a stranger, there he had time during his life.

Fitz-Williams Case, 2 Jacobi, Banco Regis, 32.

BAron and Feme, Tenants for life, and to the Heirs of the body of the Baron, the Baron sole is vouched; in a common recovery, the tail is barred. *Copledicks Case, 3 Report. 2. Resol* If the tenant in tail suffer a recovery to his own use, the remainder to his wife, with divers remainders over, with power of revocation and limitation of new uses by any such writing, he revoketh all the remainders, except that to his wife; and by the same deed limits new uses;
this

this is good, for by any such writing shall be intended the same, or any such, and it may be by the same deed; for, first it takes effect as a revocation. 2. By limitation of new uses, and there are not more instances than one in it. See there *Leaper* and *Wroth's Case*, cited 20 *Eliz.* to prove, that powers whereby the interest of strangers shall be changed, shall be taken strictly, as a power to make Leases for twenty one years, he cannot make a Lease for twenty one years, to commence in *Futuro*.

The Bishop of Bathes Case, 3 Jacobi, com. banco, fol. 34.

THE B. 18 H. 8. leaseth to E. and R. for sixty years: proviso, if they dye within the term, that the B. and his successor shall re-enter. E. dyes, the B. dyes, the successor leases to G. *cum post five per mortem, &c. prædict. acciderit vacare*, for sixty years with confirmation. R. dyeth. *Resolv.* Every Lease ought to have a certain beginning, and the continuance ought also to be certain, either by express number of years, or by reference to an express certainty, or where a Lease may be reduced to certainty by matter, *Ex post facto*. Agreed, the second Lease vests presently in point of Interest, to take effect in possession of the end of the first Term, if by none of the accidents the first Lease become void in the mean time, and then the Lease shall commence at the first accident which doth happen, and the Lessee hath no Election.

*The Dean and Chapter of Worcesters Case, 3 Jacobi.
fol. 38.*

THE D. and Ch. seised of a Mannor in fee, in which were Copy-holds grantable for three lives, for 8 s. 8 d. payable quarterly, and herriorable, grant a Copy-hold for the life of three, reserving the old rent half yearly, this is not void by 13 *Elix. cap. 1.* Resolved, the grant of a Copy-hold for the life of three is good; for, although there may be an occupancy, yet it is not inconvenient; for an occupant shall be punished in waste. 2. Grant of a Copy-hold is a demise by the intent of the Statute; for in Law, it is a Lease at will, 3. The omission of Herriot doth not make it void, because the annual rent is reserved. 4. It is sufficient that the yearly rent be reserved twice in the year, for the Statute saith, yearly; which maketh a difference between this case, and the Lord Mountjoyes Case, in the fifth Report.

Bellamy's Case, 3 Jacobi, com. banco, fol. 38.

A Lease upon condition, that the Lessee shall not alien without License, Assignee of the Lessee pleads, that the Assignment was with License, and sued not forth the Deed of License. 1. Because he did not claim by it. 2. Because the License was, *Ex provisione hominis*, and not *Ex institutione legis*. 3. Because it was executed and good.

Henry Finches Case, 3 Jacobi, Banco Regis, fol. 39.

A Grant of a Rent-charge out of divers Mannors, &c. in the Parishes of E. and W. *ant alibi dictis*
S *manerius*

maneriis spectant. and out of Lands, which is not parcel of any of the manors, these are not charged with the distress, for, *Alibi* doth not charge more Land than is parcel of those Mannors, but all parcels of the said Mannors out of the said Parishes.

Sir Anthony Myldmays Case, 3 Jacob. Banco Regis, fol. 40.

1. **R**ESolved, a perpetuity is against the rules and policy of the Common Law. 2. It is impossible that an estate tail shall cease, before that Tenant in tail dyes without issue, and an estate cannot be made to continue as to one, and determine as to another, except by Statute. 3. A gift in tail upon condition that he shall not suffer a common recovery, is voyd, because he had Power by the Law. 4. It is a voyd saying, that his estate shall cease, if he go about, &c. for, *Non officit conatus nisi sequatur effectus*. Also many ambiguities will arise thereupon, because the Law doth not define it, and it is so uncertain, that it is not traversable.

Blakes Case, 3 Jacobi, com. Banco. fo. 43.

AN accord with satisfaction is a good barre in a Writ of Covenant, because the duty accrueth not meerly by the deed, but by a tort subsequent, together with the deed; and it is a good barre in an attaint, because this is not founded upon the record only, but upon the false Oath also. In all cases where an arbitrament is a good plea, an accord with satisfaction is also, and so generally in all Actions where damages only are to be recovered.

Higgins Case, 3 Jacob. Com. Banco. fol. 44.

IF a man have Judgement upon 'an Obligation, so long as this Judgement is in force, he may not have a new action upon the same Obligation. For, *Interest reipublicæ ut sit finis litium, & infinitum in iudice reprobatur.* A Statute Staple is but an Obligation recorded, and one Obligation cannot drown another; although they be both for one Debt, and the Oblige may chose, upon whether he will bring his Action. 11 H. 4. and 2 Jac. Sir William Cornwalles Case, and Branthwaytes Case, and in every Judgement, the Defendant is amerced; and so he shall be amerced in *infinitum*.

Dowdles Case, 3 Jac. Com. Banco. fol. 46.

IN Debt against an Executor, the Defendant pleads, Fully administred; the Plaintiff saith, that he had assets at E. the Jury found assets in Ireland.

1. Resol. When the place is material, the poynt in issue cannot be found in another place. 2. Where the place is named but for conformity, assets may be found in another County. 3. In a general issue, the Jury shall find all material local things in another County. 4. The Jury by a mean shall try local things in another County, as a release in a forein Country, the Jurors shall assees damages for the profits of the Land in the other County. *Multa concedatur per obliquum, quæ non &c.* but in case of felony, the Tryal shall be where the offence was done. 5. The finding of assets is the substance, and that it is in Ireland is surplusage: A thing done beyond the Sea

shall be tryed here, if the foundation of the action be here.

Boswells Case, 3 fac. Banco Regis, fo. 48.

IN a *Quare impedit*, judgment was given, to remove the incumbent of the Queen, not party to the Writ, who was presented, pending the Writ. Resol. That by the common Law, by admission and institution, the Usurper gains the inheritance of the advowson, without regard of the nonage of the Patron, because he is in by judicial act, and the Bishop shall be supposed not to do wrong to the Patron, and the incumbent shall not be disturbed to exercise his function, but the King shall have a *Quare impedit* at the common Law. Collation doth not put him who hath right to present, out of possession; but if one have right to collate, it doth; an Infant by the act of *W. 2. c. 5.* shall have a *Quare impedit*, if a man usurp upon an Infant who had a Mannor, to which, &c. by descent, who at full age infeoffeth B. the Church voideth, &c. by the usurpation the Infant was out of possession, and his right passed not, and seems the Infant is without remedy: If a Clerk cometh in by course of Law, this gaineth not the inheritance against the right Patron, who was not party to the Writ. The King shall not recover damages by this Statute, for he is not within the first branch, *Si tempus semel sit transferit*: nor within the second branch, for that depends upon the first, yet he shall count to damages. An incumbent shall not be moved if he be not named in the Writ, and if he be not admitted, &c. pending the Writ, and lapse shall not incur, if the Bishop be named in the Writ, otherwise if he be not: If he who is presented pending the Writ, be in by rightful Patron or not, yet he who recovereth in a

Quare

Quare impedit, shall have a general Writ to the Bishop, which he must execute of necessity; and after that, the parties may try their titles, as the Law shall determine.

*Countess of Rutlands Case, in the Star-Chamber,
3 Jacobi, fo. 52.*

THAT the person of a Countess or Baroness may not be arrested for Debt or Trespas; for, although in respect of their Sex, they may not sit in the Parliament, yet they are Peers of the Realm, and shall be tryed by their Peers, *Stat. 20 H. 6.* Peers of the Realm may not be sworn in any inquest: a Countess in marrying with a Husband, doth lose her name of a Countess.

If a Baroness, &c. by Marriage, marry again under the Nobility, she loseth her dignity; but if she be Noble by birth, or descent, yet whomsoever she marryeth, she remaineth Noble; for Birth-right is *Character indelebilis*, and that which is gained by Marriage, may also be lost by Marriage.

A Sheriff ought not to dispute the Authority of Courts, but he ought to execute the Writs to him directed, for thereunto be they sworn. Serjeant at Mace upon a *cap. ad satisfaciendum*, came to the said Countess in *Cheapside*, being in her Coach, and touched her body with the Mace, and said, *I arrest you Madam at the Sute of S.* and those were all the words that were used, and thereupon compelled the Coach-man to carry her unto the Counter-gate in *Woodstreet*, and the Sheriff took her into his house. In this case it was resolved, that the Sheriff, Bayliff, &c. upon the Arrest, ought to shew at whose Sute, out of what Court, for what cause it is, and when the process is returnable; and that this general Arrest

of the Countess cannot be said, that it was by force of the said Writ of Execution, and that this Arrest was of the Serjants own head, without warrant, and against Law, and that the said Countess was falsely imprisoned; but she remained in the Sheriffs custody 7. or 8. dayes, untill she paid the Debt: but because the Arrest was, by a feigned Action, entered in the Counter, the Serjeants were sentenced.

The Lord Chandos Case, 4 Jacobi. fol. 55.

THE King grants to B. in tail, and in consideration of the surrender of the Letters Patents, by force whereof the King is seised in fee, granteth to him and his wife, and to the heirs of B. the reversion passeth, for the recital that the King was seised in fee, was but the Collection of the King, and no part of the consideration or suggestion of the party; And when the King grants land in possession, if he had but a reversion, this shall pass, for he is not deceived because less passes than he intended.

Bredimans Case, 4 Jacobi, Com. Banco. fol. 56.

A Man deviseth a rent for life out of a Mannor, and he deviseth the Mannor for years, the term enters, and payeth the rent; after the Term, the devisee brings an assize against the Terr-tenant. *Resol.* Payment by lessee for years of the rent giveth no seisin to have an assize. 1. In respect of the imbecillity of his estate. 2. He cannot give seisin because he had not seisin, and therefore a *Præcipe* lyeth not against him, because he cannot render seisin; but he may take seisin to the use of him in the freehold: A disseisor may give seisin of a rent seck, because he hath a freehold, and it is lawful, 3. A rent seck is *cactus & pignus*

secus, therefore it behoveth the first payment (which giveth life unto it) shall be made by a Tenant of the freehold, and in this case being created by devise, an Annuity lyeth not thereupon, otherwise if it be by grant: and Tenant of the freehold ought to attorn to a grant of such a rent over, therefore he shall give seisin: But seisin by a Bayliff is good, if seisin were had before within sixty years, and seisin given by Tenant at will is good, but it ought to be pleaded as payment by the lessor himself. If the King hath rent out of a ville to be paid by all the Inhabitants; seisin alledged in general, without naming any, is good.

Gatewards Case, 4 Jac. in cem. Banco. fol. 59.

TO claim common *ratione Commerantiae & residen.* in villa de B. is not good; for no man may have interest in common in respect of a Messuage, wherein he hath no interest; For custome should alwayes extend to that which hath certainty & continuance, and without question tenant in fee simple ought to prescribe in his own name, and tenant for life or years by *Elegit* at will, &c. in the name of him that hath the Fee, and he that hath no interest, cannot have any common, and none that hath any interest, although it be but at will, and ought to have common, but by good pleading he may enjoy the same.

No improvment might be made in any wastes, if this custome (*viz.* in respect of Habitation and Commerce) should be allowed, for tenants for life or years at will, by *Elegit*, by Statute, &c. of the houses of the Lord, should have common in the waste of the Lord, if this prescription were allowed, which were inconvenient: A Custom that every inhabitant in B. shall have a way over such grounds, either to

the Church or Market, &c. it is a good custom, for that is only easement, and no profit, and a way or passage may well *sequi personam*; The Lord cannot claim common in his own soyl.

A diversity was taken and agreed upon between a prescription and a custom, a prescription is alwaies alledged in the person, and a custom ought alwaies to be alledged in the Land; for every prescription ought to have by common intendment a lawful commencement; but otherwise of a custom, for that ought to be reasonable; and *ex certa causa rationabili usitata*, as Littleton saith; but it needeth not to have intendment of a lawful commencement, as custom to have Land devisable, or of the nature of Gavelkind, or Borough-English. These, and such like customs, are reasonable; but by common intendment, these cannot have lawful commencement, by grant, or act, or agreement, but only by Parliament; and the custom in the Case at bar was repugnant; for it was alledged, that the custom of the Town was, that every Inhabitant had used to have common within a place in the Town of H. which was another Town.

Catesbyes Case, 4 Jac. fo. 61.

Six months being half a year (*semestre*) is given to the Patron of an advowson to present, and, according to the Kalender, and not after 28 daies to a Month; and the Statute saith, *Si tempus semestre non transierit, adjudicentur damna ad valorem, &c. super dimidium anni*; and being ambiguous, it shall be construed for the benefit of the Patron.

Sir Moyle Finches Case, 4 Jac. com. banco, fo. 63.

THe Lady M. Tenant for life of the Mannor of B. the remainder in fee to the Lady Finch, she and S. her Husband and D. levied a fine to one of the demesns, who grants and renders to D. for 50 years, the reversion to S. and his Wife, and her heirs, with proviso in the Deeds which directed the fine that the Reversioner shall enter and hold Court; And it was averred, that this was known by the name of the Mannor of B. D. maketh his Son of three years of age Executor, and administration was committed to R. T. S. and his wife levy a fine of all the Lands of the wife in K. except the Mannor of B. to the use of the Feme for life, the remainder to Sir M. F. R. T. demiseth to P. for ten years, Dame M. dyeth, P. L. entreth, by vertue of a power of revocation and limitation of new uses, S. with the assent of the Lady F. his wife, limireth the uses to one who ousteth P. L. and maketh a Feoffment to the use of the Lady F. for life, the remainder to H. F. in tail, P. L. re-enters, Dame F. dyeth, H. F. for rent arrear distraineth.

1. *Resol.* By the grant and tender of the demesns the Mannor is destroyed, because in an instant the services and demesns are severed by act of the party; but otherwise it is, if by act in Law, as upon partition; so it is of an advowson appendent, &c. and upon partition many Mannors may be made of one, but not by the act of the party. 2. B. is excepted by the name of a Mannor. 3. Because the intent of the parties is so. 2. Exception of Misnomer shall not be favoured in Law. 3. It is sufficient in Law in many cases, that a thing be reputed as it is named; as if a remainder be limited to a Bastard by the name

name of son of J. S. and as to that was objected, that this reputation is not time out of mind; this needs not, if it be of convenient time as this was, for it was a Mannor *re vera* before to levy a fine, and continue the name after, so that this reputation is stronger having such a ground, and reputation serveth in Writs amicable, although not in adversary.

3. The lease made by the Administrator *durante minori etate*, is good, because the administration is general, and not special to the benefit of the Infant, but howsoever this is good during the administration.

4. P. L. in the life of the Lady M. had but *interesse Termini*, and so that attornment cannot be in his life, but after the death of the La. Mo. by entry of the lessee the reversion is in S. and his wife without attornment, because attornment needs not, because the reversion is settled, and he hath no means to compel, &c. otherwise it is where an attornment may be had: and although that P. L. lessee of a lessee of part cannot make an expresse attornment, yet his re-entry shall be attornment in Law, so he who hath *interesse termini*, may make a surrender in Law, but no expresse surrender; and a man of *non sane memoria* may make an attornment in Law, but not any expresse attornment.

The Lord Darcies Case, 4 Jacobi, Com. banco fol. 70.

TENDER is not necessary to have the single value of the heir male or female; but the heir female shall not forfeit the double value, because the Statute of *Merton* is *si se maritaverit* at the age of 14. years, &c. at which time the heir female is out of ward: and where by the Statute of *Westmin.* 1. cap. 22. it is provided that the Lord shall have two years to make

a Tender, it giveth not the double value, but if he waive the two years, he shall have the value without Tender; *quia de mero Jure, &c.*

Burrels Case, 5 Jac. Com. Banco. fol. 72.

IF the father make a Lease by fraud and dyes, the son sells the land knowing or not knowing of it, the vendee shall avoid it. 2. If the father makes a Lease to the son, who assigneth it over by fraud, the father dyes, the son sells the land, the vendee shall avoid it.

Sir Drue Druries Case, 5 Jac. Cur. Wardor. fol. 73.

EI. granted to the Town of Y. *Quod omnes de villa orinadi licet terras, &c. extra libertatem villa, &c. tenuerunt in Capite, se maritare possint juxta libertates villa predicta: R. D.* dyed seised of a house parcel of a Monastery, dissolved in the time of H. 8. holden *in capite*, the King grants the wardship of his son to the Plaintiff, and makes the Ward Knight, the Plaintiff brings a *valo e Maritagii*.

The Charter doth not discharge the Defendant;
1. Because it is *juxta libertates villa predicta*, and the liberties are not shewed
2. This Charter cannot extend to a Tenure created in the time of H. 8.
3. It is not shewed that the Defendant was born within the Town,

Resol. If the heir in Ward be made a Knight, he is out of Ward for his body, because by intendment he is able to do Knights service, otherwise if made a Nobleman.

2. By the death of the Tenant the value of the marriage is vested in the Lord, and cannot be divested by Knighthood, &c.

3. If

3. If he be Knighted in the life of his Ancestors, he shall not be in ward at all.

4. If making of the heir in ward Knight shall de-vest the value, it will be prejudicial to the Subject, and to the King, for none will buy their wardships.

5. After Tender and Refusal, if the Heir be made Knight, and marry, he shall not forfeit the double value, because he is out of ward, but immediately the Lord shall have a Writ *de valore maritagii*.

This was the last Case that Sir John Popham Chief Justice of England, &c. ever argued.

Sir George Cursons Case, 7 Jac. 6. wr. Wardor. fol. 71.

Sir W. L. seised of a reversion expectant upon tail (made to his Son) of Land in *Capite*, Covenants to stand seised to the use of his neece; the Son dyeth, the King shall not have premier seisin.

1. *Resol.* It was collusion apparent within the Statute of *Marlebr. cap. 6.* to infeof the Heir apparent; and if he infeof others upon collusion averable, but no averment shall be where the remainder or reversion is left in a stranger, or upon a Devise.

2. Or otherwise to dispose in the Statute of 32 H. 8. hath relation to Wills only, for before the Statute every man might dispose of his Lands by Act executed.

3. The Clause in the said Statute which saveth premier seisin to the King, hath relation only to acts executed, for the King shall have without that premier seisin of the third part not devised, but without that he shall not have it of any part conveyed by act executed.

4. If the Grandfather convey Land to the Son, living the Father, this is out of the Statute; otherwise if

if the Father be dead : and so a gift to 'a Collateral Kinsman, who is not heir apparent, is out of the Statute, for none will (by intendment) dis-inherit his heir, to defeat the King of his Wardship, or primer seisin, and so is the experience of the Court of Wards.

Bullens Case, 5 Jac. com. banco, fol. 77.

THe Lord may have a certain *Summa pro certo leta*, for it shall be intended it was granted at the first by purchase of the *Leet* for the ease of the Tenants, and in consideration of the Lords claiming of it at his own costs every Eyr; the issue was, if the Plaintiff was a chief pledge, and by special verdict he was found a Resiant, and certified by the chief pledges to be a chief pledge, and was amerced for his default. It seemeth he was not, *sed materia predicta consopita fuit in arbitrio*. See 30 E. 3. 23. Of frank pledges.

Lord Abergavencies Case, 5 Jac. com. banco, fo. 78.

A. Judgment in an Action of Debt is had against joynt-tenant for life, who afterwards releaseth to his companion all the right, &c. yet that moytie is liable to the Judgment, and so it is of a rent-charge during the life of the Releasor.

Sir Edward Phyltons Case, 5 Jac. com. banco, fo. 79.

Executors may take benefit of the Kings general pardon, by which is enacted, that all subjects of the King, their Heirs, Successors, Executors, and Administrators, shall be acquitted and discharged of all offences, contempts, &c. and that shall be expoun-
ded

ed most beneficially for the Subject. And further doth give and grant all Goods, Chattels, Debts, &c. forfeited; And prohibiteth any Clerk to make out any Writ, &c. Provided that every Clerk may make forth *cap. ut.* at the sute of the Plaintiff against persons outlawed, to the intent to compel them to answer; and that the party shall sue forth a *scir. fac.* before the pardon in that behalf shall be allowed; which is as much to say, having regard only to the Plaintiff; But in regard of the King, it is an absolute pardon, and grant of his goods, and he is a person enabled against the King, but not against the party plaintiff. And every person by himself, or his Attorney, may plead this act for discharge: Executors shall have restitution upon the Statute 21 H. 8. Also Administrators shall have a Writ of error upon the Statute 27 El. as was adjudged in the Lord *Mordants Case*, 36 El. And yet these Statutes speak only of the party, and not of the Executors or Administrators; and because no Writ can be against Executors, they may plead it without Process.

The End of the Sixth Book.

THE



THE SEVENTH BOOK.

*Postnati.**Calvins Case, 6 Jacobi, Banco Regis. fol. 1.*

C. by his gardian bringeth an
 affize, the Defendants, say, the
 plaintiff ought not to be answered,
Quia est alienigena, natus 5.
Novembris, Anno Domini Regis
Anglia &c. tertio, apud E. infra
regnum Scotie ac infra ligeanciam
Domini Regis Regni sui S. ac ex-

tra ligeanciam Regni sui Ang. &c. The Plaintiff demurreth.

The Case was Adjourned into the Exchequer-Chamber, and was argued by two Justices every day, and by the Chancellour, and resolved by the Chancellour, and all the Justices (except *Walmsley* and *Foster*) that the plaintiff ought to be answered.

For these six demonstrative Conclusions drawn from the Law of nature, the Law of the Land, Reasons of State, Authorities of Records, and Book Cases.

1. Every one that is an Alien by birth, may be, or might have been, an enemy by accident but C. could never be an enemy by any accident whatsoever; *ergo*, no Alien by birth.

2. Whosoever are born under one natural ligeance, due by the Law of nature to one Sovereign, are

are natural born Subjects; but C. was born under one, &c. *ergo*, a natural subject.

3. Whosoever is born within the Kings protection, is no Alien; but C. was born under, &c. *ergo*, he is no Alien.

4. Every stranger born, must at his birth be either *amicus*, or *inimicus*, but C. at his birth could neither be *amicus*, or *inimicus*, because he was *subditus*, *ergo*, no stranger born.

5. Whatsoever is due by the Law of man, may be altered, but natural leageance of the subject to the Soverain, cannot be altered, *ergo*, not due by mans Law.

Lastly, whosoever at his birth cannot be an alien to the King of E. cannot be an alien to any of his subjects of E. but C. at his birth could be no alien to the King of E. *ergo*, he cannot be an alien to any of the subjects of E. The Major and Minor both be *Propositiones perspicue verae*; and although *Alienigena dicitur ab aliena Gente*: yet that is all one, as *Aliene ligeantie*, and arguments drawn from Etymologies are feeble; for *Sapenumero ubi proprietates verborum attenditur, sensus veritatis amittitur*, yet when they agree with Law, Judges may use them for ornament; and divers inconveniences would follow, if the Plea against the Plaintiff should be allowed: For first, it maketh leageance local, whereupon should follow, first, that leageance which is universal, should be confined within local limits. 2. That the subject should not be bound to serve the King in Peace or in War out of those bounds. 3. It should illegitimate many, which were born in *Gascogne, Guyen, Normandy, &c.* and divers others of his Majesties Dominions, whilst the same were in actual obedience. And lastly, this strange and new devised Plea inclineth too much to countenance that dangerous and desperate error of the

the *Spencers* (*viz.*) That the Homage and Oath of leageance, was more by reason of the Kings Crown, (that is, of his politique capacity) than by reason of the person of the King, which was condemned by two Parliaments, one in the Reign of *E. 2.* called *Exilium Hugonis le Spencer*; and the other in *1 E. 3. c. 1.* No one Opinion in all our Books is against this judgment. The Lord-Chancellour and twelve of the Judges, concurred in one opinion herein, and not in any remembrance so Honourable and Intelligent an Auditory as was at this Case.

Bulwers Case, 27 Eliz. fol. 1.

H Recovered against the Plaintiff in the common place, and dyeth; the Defendant in the name of H. outlawed the Plaintiff, who brings an Action of the Case in N. where the first Action was brought, and recovered, for there was the visible tort; when matter in one County dependeth upon matter in another County, the Plaintiff may choose in which County to bring his Action (except that the Defendant upon general issue pleaded, may be prejudiced of his Trial,) as if two conspire in one County, to Indite one in another County, and do it, an Action may be brought in either, but if he be Indited, but not by them, there it shall be brought where the conspiracy was. If Manasse be made in E. whereby my Tenants recede into L. an Action shall be brought in E if an Action be founded upon two things, material and traversable in two several Counties, an Action may be brought in any of them. An Annuity granted in one County to be paid in another, the Action shall be brought where the grant was, he who is robbed may have an appeal of felony, in every County where the goods came, but of

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robbery where the fact was done only : A lease for years in one County, of Land in another, Debt shall be brought, where the lease was made, and Waste where the Land lyeth; every Action which concerneth the life of a man shall be brought where the offence is committed : Every issue which ariseth upon an Action, in which Land shall be recovered, shall be brought where the Land lyeth, as in right of ward of Land, or body, or intrusion of ward, and forfeiture of Marriage, and *Valore Maritagii*, and *Quare impedit* : but ravishment of ward, where the ravishment was; and a *Quare non admisit*, where the refusal was, before the Statute of 27 R. 2. c. 10. And Action for Land in divers Counties, or for Common in one County appendant to Land in another County, shall be brought by several Writs in both Counties, but now, *In conspectu comitatum* : and *per que servitia* shall be brought where the note of the fine is levied.

Sir Miles Corbets Case, 27 Eliz. in *Scaccario*, fol. 5.

REsol. That the special manner of Common in *Norfolk*. called *Schacke*, to be taken in arable land after harvest until sowing begin, is good. Resol. also, If in D. there are fifty acres, and in S. 100 l. who ought to intercommon for vicinage, D. cannot put in more in their Common than it will depasture, and so to escape reciprocally; for the original cause of this Common was only to prevent sutes in *Champion Counties*.

*Cases upon the Statute of 13 E. 1. of
Winchester upon hue and cry.*

Sendills Case, 27 Eliz. in com. banco, fo. 6.

A Robbery for which the Hundred must answer by force of the said Statute, is to be done openly, so as the Country may take notice thereof themselves; but a Robbery done secretly in the house, the Country cannot take notice thereof: for every one may keep his house as strong as he will at his peril; for it was adjudged in *Ashpoles* case, that the party robbed, needed not to give notice thereof to the Country; for it may be that the party robbed was bound or maimed, &c. so as he could not make hue and cry to give notice. A Robbery was done in *January* presently after the Sun setting during daylight, and it was adjudged, that the Hundred should answer for the same; for it was a convenient time for men to travel, or to be about their business. One was killed in the evening and escaped, and by the common Law the Town was amerced; for that was accounted in Law parcel of the day, and not of the night. But by the Statute 27 *Eliz. cap. 13.* none shall have action upon the said Statute, except the party robbed, so soon as he may, give notice of the same to any of the Inhabitants of any Village, Town, or Hamlet, next to the place where the Robbery was done; and, if they in pursute apprehend any of the offenders, that will excuse the Town.

Milbornes Case, 29 Eliz. in Com. Banco, fol. 6.

A Robbery was done in the Morning *ante lucem* the Hundred shall not be charged; *Cum quis felonice occisus fuit per diem, nisi felo captus fuit, tota villata illa amercietur.*

The Earl of Bedfords Case, 29 Eliz. fol. 7.

1. **R**esol. If Tenant in tail make a voydable lease for years, and dyeth, his heir in ward to the King, or other Lord, the Lord shall avoyd this lease; but if an Infant make a feoffment, the Lord by Escheat shall not avoyd it, but a gardian shall, because he doth it in right of the Infant.

2. This avoydance is but during the interest of the Lord, for afterwards the heir may make it good: But if he who hath a particular estate avoydeth an act in all, after his Interest determined, it shall not be made good: as if a feme be indowed of an appropriation, and her Clerk inducted, the appropriation is defeated for ever; so if a feme Covert (as a feme sole) levy a fine, and the Baron enters, and dyeth, the Conusee shall not have the land, for the estate is wholly defeated.

Ughtreds Case, 33 Eliz fol. 9.

THE M. of W granted the Captainship of a Fort to the Plaintiff, and for exercising of the said office and for finding a Master-Gunner, and six Souldiers, granted to him an Annuity of 32 *l. per annum*, the Plaintiff brings an Annuity.

1. Except. It doth not appear by the Count that the M. hath power to grant this office, *Non allocatur.*

2. The

2. The Plaintiff doth not averre the exercising of the said office ; *Non allocatur*, for if he had not used it, that shall come in on the other part, because this is a condition subsequent, and not precedent, but if one be to have a thing in consideration of an Act to be done by him, there he must shew the performance, because that amounts to a condition precedent, as in debt for salary, but if each party had equal remedy, one for the money, and the other for the act to be done, there the Court shall be without shewing the performance, as if one Covenant to serve, &c. and the other Covenants to give money, &c. But although that an interest vested is to be devested by non feaſance, if it appear to the Court that an action is not maintainable without the doing of it, there the doing of it must be averred ; as if an Abbot sole grants an annuity to J. S. *pro Consilio*, &c. in action brought against the ſucceſſor, he must averr that he had given Counsel, &c. to the use of the House, otherwise if against the grantor.

Englefields Case, 34 Eliz. in Scaccario. fol. 11.

SIR F. E. covenanted to stand ſeiſed to the use of himself for life, the remainder to his Nephew, Proviso that it shall be voyd upon tender of a Ring by him, after he was attainted of Treason, and all his inheritances forfeited by Statute; the Queen leaseſth to the Defendant for forty years, by Statute it was enacted, that every one who had a patent of land of a person attainted, shall exhibit it into the Exchequer within two years to be inrolled ; one authorized by letters patents in the name of the Queen renders the Ring in the life of Sir Fr. the Queen bringeth in a ſummon.

1. *Reſol.* When the Q. tenant *per a iter vie* leaseſth

for years, this is good without recital of her estate, for it is less than her estate, as if she grant *Totum suum*; for there is no more, and she is not deceived.

2. That this condition is given to the Q. but objected, 1. That it was inseparable from Sir Fr. for his intent was the substance of it, and his intent cannot be transferred over. 2. Natural affection is made the Judge, whether the Nephew deserve that the use shall be revoked, and in so much that natural affection cannot be transferred, no more can this condition which was created by natural affection, and natural affection determineth the estate. 3. Although the benefit of this collateral condition be given to the Q. the performance is not. As to the first and second; it was answered, That the condition is only the substance, and all the residue is but a flourish, and that is not an inseparable condition; for any one may tender a Ring as well as he.

As to the third; The performance is given to the Q. as incident to the condition.

4. It was objected, That the estate of Sir Fr. was not subject to the condition, because he was not possessed by limitation of use, and by 27 H. 8. but he was seised of his ancient inheritance, *ergo*, the lease shall not be avoided in the life of Sir Fr. It was answered, That Sir Fr. was seised by limitation of use, and that the lease shall be avoided.

5. It was objected, That the Q. having made this lease, being seised *per auter vie*, by her own act she shall not defeat it after: It was answered, That the Q. shall avoid it, for her grant shall not inure to two intents; 1. To make the lease, &c. 2. To suspend the condition; and when the Q. had two rights, she shall not lose both without special words.

6. It was objected, That this tender ought to be found

found by office, because matter *in pais*; and if it be false, the party hath no remedy, because the Certificate is not traversable: It was answered, That Certificates which inform the Q^{ueen} of her title, are traversable; but Certificates, which are in nature of Tryals, are not: also by the Tender the uses are determined, and by the attainder, and the act of 33 H. 8. the land is vested in the Q^{ueen}

It was objected, That the conveyance was void, because it was not inrolled within two years, as the Statute requires, and so Sir Fr. was seised in fee, and the lease unavoidable. It was answered, That it was rendered in the Exchequer to be inrolled within two years, which is all the Statute requireth; the forfeiture was established by a special act, 35 Eliz.

The Case of Swans, 34 Eliz. fo. 15.

A Game of Swans in a common River are seised into the Queens hands upon office found, I. Y. pleads that *Abbas, &c. gavisæ fuerunt toto proficuo omnium cygnorum in æstuario prædicti edificantium*, and makes her self title to them and prayeth an ouster *Le maine*: All wild Swans in a common River who have gained their natural liberty, may be seised for the King; because they are *Volatilia regalia*, but a subject may have them in his own River; and if they escape into a common River, he may take them again; upon fresh pursute, Cygnets shall be divided between the owners of the Swans equally, but upon the Thames the owner of the Land shall have the third by the custom: whosoever hath a Swan mark, must have it by grant of the King, or prescription, and he may grant it over, and he ought to have freehold of five Marks *per annum*, by the Statute of 22 E. 4. c. 6. A man may prescribe to have wild Swans, but not

as here, but that the Abbot, &c. have used to take of them to their own use, and therefore adjudged against J. Y. A Swan may be an estray, and so cannot any other fowl.

Sir Thomas Cecils Case, 40 Eliz. in Scaccario. fol. 18.

SIR T.C. entred into an obligation to the Queen to perform Covenants, and shewed in the Exchequer-Chamber matter of equity to discharge him of the said Debt, according to the Statute of 33 H. 8. c. 39.

1. Resol. That branch of the Statute which giveth liberty to the Subject to plead matter in equity in barre of Debt due unto the King, extendeth to Debts due at the Common Law, as well as by the Statute, because the Statute gives more speedy remedy for them, and so within the purview thereof, and so the other proviso of equal charging of Land Subject to Debts of the King is general.

2. The Court of Exchequer-Chamber in this case may decree upon English bill, although that Process be in the Exchequer at the Common Law, because to that purpose they are as one Court.

3. An Obligation to perform Covenants after Breach of them is within the Statute.

The Lord Andersons Case, 41 Eliz. in Scaccar. fol. 11.

TENANT in tail is bound by recognizance to J. S. who is attainted, Tenant in tail dyes, his issue aliens *Bona fide*, the King shall not extend these lands by the Statute 33 H. 8. c. 39.

1. Before that Statute the King could not extend lands in the hands of the issue in tail, for the Debt

of his auncestor, because he was bound by W. 2. *De Donis*.

2. By that Statute lands are extendable in the hands of the issue in tail; for, Debt due to the King by judgement, recognizance, obligation, or other specialty, and other cases are out of the Statute.

3. The Alienee *Bona fide* is not within the Statute, because favoured as a purchaser, and he is a stranger to the Debt, and comes in upon good consideration, and benefit is given against the issue in tail, which was not before.

4. Debts due to a Subject and forfeited to the King, are not within the statute, for they are not due originally to the King by any of the said four ways mentioned in the act.

Butts Case, 42 Eliz. in Com. Banco: fol. 23.

A Seised of black acre in fee, and of white acre for years, grants a rent charge to B. for life, with distress in both, B. distrains, and avowes in white acre, and good.

1. Resol. White acre is charged during the term and life of B.

2. All the rent issueth out of black acre, for as an estate of freehold it cannot issue out of white acre, nor as freehold out of black acre, and a chattel out of white acre, because intire, it cannot be construed to be two rents contrary to the intent of the parties, and therefore an acceptance of a Lease of white acre doth not suspend it, and in an assize black acre only shall be put in view.

3. Although the rent issueth only out of black acre, yet white acre is charged with a distress. If a rent be granted out of three acres with clause of distress in one, this is a rent seck for all, yet the grantee

ree shall distrein in the third Acre for it; so if a rent be granted to two with clause of distress to one of them: but a rent may be seek, and charge at several times; and therefore if a rent be granted in fee with distress for life, it is a rent charge for life, and seek after; but if the clause of distress be for years, it is a rent-seek for all, because the freehold is seek.

The avowry was insufficient. 1. Because he said, the rent issued out of white acre, where it issued out of black-acre; and, although the Plaintiff had disclosed the truth in his plea in barr, this doth not save the matter in substance vicious in the avowry. 2. He deriveth the rent out of white-acre, *Virtute cuius*, he was seised for life, which is repugnant to have a freehold out of a Chattel, and so Judgment was given against him for insufficient pleading.

Cases of Quare Impedit.

Halls Case, 31 Eliz. fol. 25.

A *Quare Impedit* against the Bishop, and Incumbent, without naming the Patron, the Writ shall abate. 1. It is not reason the Patron shall lose his Patronage, without being named in case where he may be named, as here. 2. The Incumbent at the common Law could not plead to the Patronage, and therefore it is no reason that he who cannot plead be named, and he who can omitted; but now the incumbent may plead to the Patronage by the Statute of 25 E. 3. cap. 7. which inableth the possessor to counterplead the title of the King, and by equity against a common person, in the one case after induction, in the other after institution: But in case where the Patronage shall not be recovered, or that the Patron cannot

Lib. 7. Sir Hugh Portmans Case. 283

cannot be named, as in the Kings Case, a *Quare impedit* shall be against the Incumbent sole, or against him and the ordinary; so if a Bishop disturb and dye, it shall be against the Incumbent sole, if a Patron be named and dye, if the Writ shall not abate, he shall be out of possession, and if it shall abate, the tort shall not be punished; but if the Patron be put out of possession, he hath remedy by Writ of right, and it shall abate, the Plaintiff is without remedy, therefore the Writ shall stand.

Sir Hugh Portmans Case, 40 Eliz. fo. 27.

If the Plaintiff in a *Quare impedit*, after appearance be non-sure, or discontinue, or be made a Knight pending the Writ, this is peremptory, because it is his own act; otherwise if the Writ abate for default of form, or by misnomer, for this may be the default of the Clerk.

Baskervills Case, 27 Eliz. fol. 28.

Title devolveth to the King to present by lapse; the Patron presents one who dyeth, the King hath lost the presentation, for he having the first presentation, he shall not have the second: otherwise the King may suffer strangers to present one after another, and take his turn when he pleaseth, and by that means the Patron shall be in a manner disinherited; and the statute of *Prærogativa Regis, nulum tempus occurrit Regi*, is to be intended when the King hath a permanent Title, and not transitory, when time is the substance of his Title.

Maunds Case, 43 Eliz. fol. 28.

IN case of a re-entry for non-payment of rent, or when any sum, *Nomine pœna*, is to be forfeit, in both the cases Demand ought to be made precisely on the day, a convenient time before the setting of the Sun, in the one case in respect of a condition, and in the other in respect of the penalty ; but in case of distress, he that hath the rent may demand the same at what time pleaseth him, for no loss or penalty insueth thereupon, but only a remedy to come by his rent, and if demand be made any time after the day, and before the distress, it sufficeth.

*Discontinuance of Process, &c. by the
death of the Queen, Trin. 1. Ja-
cobi. fol. 29.*

UPon a general resummons, the original, and the issue are revived, and not the mean process, nor Voucher, nor Garnishment, but all the Process is revived upon a special resummons, but not in aid prayer; for if a Verdict be given, and the King dyeth before the day in banck, because there summons lyeth not, therefore he shall not have resummons, but in case of verdict, he for whom it is given may have his judgement upon *Scire facias*. But now, by the Statute of 1 E. 6. an action, sute, bill, or plaint, shall not be discontinued, if they are returned, otherwise if not, because the Statute saith, Depending. If one deliver an appeal to the Sheriff within the year, and the King dyeth, for necessity the Plaintiff shall have a *Certiorari*, and reattachment : so if a for-
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medon be brought within a year against the penor of the profits; offices of Sheriffs, not being of inheritance or by Charter, are determined by the death of the King. Sutes depending in inferiour Courts are out of the Statute; if the King dye after information preferred by him, all the proceeding is lost, but the information shall stand. 1. Because this is a record for the King, which shall not abate. 2. Because informations upon certain Statutes are to be preferred within certain time; but if the King bring an original and dye, this is lost; if one plead to an Indictment, and the King dye, he shall plead *De novo*; but if he be convicted, Judgement may be given in the time of another King, by the said Statute, and not before.

*Case of a Fine levied by the King, tenant in tail, fo. 32.
Michaëmas, 2 Jacobi.*

A Fine levied by the King, tenant in tail by gift of his auncestor who was a subject, barrerh the tail. 1. It is reason, that as the King is bound by the statute of *W. 2. De donis*, that he should have benefit of the Acts of 4 H. 7. & 32 H. 8. 2. A general statute bindeth the King of Lands descended from an auncestor a subject, but not where it descends from an auncestor who was King, except in special cases. 3. The issues of the King at the time of the levying of the Fine are subjects, therefore within the statute, and it seem'd to them that there ought to be Letters Patents to give power to the Conisee to enter into the Land.

Nevills Case, 2 Jacobi, fo. 33.

THe dignity of an Earl intailed, is forfeitable for treason. 1. Resolved, this is within the Statute of *W. 2. De donis.* and experience is, to give dignities in tail, with remainder over; also, this was an office anciently, and offices may be intailed. 2. A dignity may be forfeited at the common Law, by a condition in Law, for the Office of Earl was, *ad consulendum Regem tempore pacis, & defendendum Regem tempore belli*; therefore he forfeits it when he takes Counsel, and arms against him. 3. If it were not forfeited by the common Law, yet it is by *26 H. 8. cap. 13.* by this word Hereditament, and the words use or possession which are added, are to shew, that every Hereditament shall be forfeited: at the common Law; Donee in tail had *potestatem alienandi post prolem suscitata*, but if he retain the land himself, he hath no absolute fee; for none shall inherit but the heir, *per formam doni*; so it is now in case of annuity, and other things out of the statute.

Penall Statutes, 2 Jac. fo. 36.

WHen a Statute is made by Parliament, the King cannot give the penalty, benefit or dispensation of the same to any subject, but the King may make a *Non obstante*, to dispense with any particular person, that he shall not incur the penalty of a statute, and the King after a forfeiture or penalty of a statute by judgment and recovery, may grant the same to any of his subjects, by way of reward; and all the Judges of *England* subscribed to this, the eight day of *November, 1604.*

Lillingstones

Lillingstones Case, 5 Jacobi, fo. 38.

A Enant in fee grants a rent-charge; proviso, that the person of the grantor shall not be charged: the grantee acknowledgeth a recognizance according to 23 H. 8. and after releaseth to the grantor, the conisee sueth an extent, and brings debt against the grantor Terretenant. 1. Resolved, the rent is extendable; for notwithstanding the release it is *in esse*, as to the Conisee, and cannot be discharged by the act of the Conisor; also, the extent relateth to the judgment, at which time it was extendable. See the Lord *Aburgavenies* Case, in the sixth Report. 2. Debt lyeth not so long as the extent endureth, for so long the rent hath continuance, although that by the release the free-hold be determined: if a rent-charge be granted for life with proviso, as above said, if the rent be determined, debt lyeth against the grantor, because he had no other remedy.

Bedels Case, 5 Jacobi, fo. 40.

R. B. covenants in consideration of paternal love, &c. to stand seised to the use of himself for life; the remainder to his wife for life, the remainder over. 1. Resolv. Although the consideration in the deed runneth not to the wife, yet another consideration may be averred, which stands with the Deed. The limitation of an use to the wife importeth a consideration in it self so if it be to any of his blood, but if he covenant in consideration of a 100 l. to stand seised to the use of his Son, nothing passeth until Inrollment, *quia expressum facit cessare tacitum*.

Beresfords

Beresfords Case, 5 Jacobi, fol. 41.

AN use is limited to A. B. and of the heirs Males of the said A. lawfully begotten, this is fee tail, notwithstanding the words (of the body) be wanting, and that (lawfully begotten) are implied, for no heir shall inherit, who is not lawfully begotten. Resolved, that to create an inheritance, the word [Heirs] is necessary, but the words *de corpore* are not necessary to make an estate tail, if there be words which Tanta-mount; and here the sense according to the intent of the Donor, is of, or by the said A. lawfully begotten. A gift to a man & *heredibus de se exeuntibus*, or *Hereditibus suis de prima uxore sua*, are estates tail.

Kenns Case, 4 Jacobi, fo. 42.

C. K had issue by E. S. ; M. K. and they are divorced, and the Marriage sentenced void, C. K. marrieth F. they have issue E. K; C. dyeth; E. K. is found by office to be Heir ; M. and W. her Baron preferr a Bill, in the Court of Wards to traverse the office, to which the Committees of the Wardship answer, one of the Committees dyeth, M. and W. sue a Bill of Reviver, and M. having issue E. dyeth ; her issue, and R. her Baron, bring a new Bill of Reviver.

1. Resolved, So long as the sentence stands in force, the issue of the first feme is a Bastard, because the spiritual Judge hath jurisdiction thereof, and our Law giveth faith unto it : Sentence of divorce may be repealed after the death of the parties, but no divorce can be after their death, for that will Bastardise the issue, and the Court of the King hath trial

all of it originally, not being hindered by any sentence.

2. The Plaintiff shall not have a traverse without an office found for her, for the King being sure of wardship shall not be ousted by one, before that he be sure to have benefit by him; and 2 E. 6. cap. 8. doth not extend to give a traverse without office, but if by two offices two are found Heirs, whereof one is within age, by that statute the other may traverse immediately.

3. A bill of reviver upon a bill of reviver, shall not be suffered, for the infiniteness, no more then a Writ by Journeys accompts. By all the last bill was absurd, which prayeth that the first bill be revived, because M. was dead, but it ought to be that her Heir may traverse.

The End of the Seventh Book.

V

THE



THE EIGHTH BOOK.

The Princes Case, Jacobi in Chancery, fol. 1.

HE Queen, 37 *Eliz.* grants three Mannors, parcel of the Dutchie of C. to H. L. and G. M. The King (at the supplication of the Prince) brings a *Scire facias* against the said H. L. and S. H. to make Livery to the Prince, by force of the statute of 11 *E. 3.* H. L. pleads *Null tiel record*, S. H. pleads the patents with a *Non obstante* 32 *H. 8.* whereby these Mannors were made parcel of, &c. and the Act of Confirmation, 43 *Eliz.* As to the plea of H. L. the Atturney sheweth an *Inspecimus*, and demurreth upon the plea of the other two who joyn, and as *Amici curie*, repeat part of the statute of 1 *H. 7.* touching the Dutchie, H. L. demurreth.

1. Resolv. the Charter of creation of the Prince, Duke of C. 11 *E. 3.* is an Act of Parliament, for such a limitation to the first begotten Son is void without statute; for if Grandfather King, the Father Duke, and Son be, if the King dyes, the Father is King, and the Son Duke, by the said statute, against the rules of Law.

2. The Lands cannot be so annexed to the Dutchie, that they cannot be severed without statute.

3. The estate is limited to cease when the King hath no first-begotten Son, and to revive when he hath,
V 2 which

which cannot be without statute. 4. It should be absurd, that six being then created Earls, that their creation should be firm, and the Creation of the Prince voyd.

5. In the Charter there is *De communi concilio Prælatorum, &c.* and in the end, *Per ipsum Regem, & totum concilium in Parlamento*; such an Act as beginneth *Rex Statuit*, and alwayes reputed for a statute, shall not be drawn in question; but if it be *Rex ex assensu* the Commons or Lords, omitting the other part, it is voyd. 2. The said Charter having the force of a statute, is good, without ayd of any other statute, and although the King in his *Scire facias*, recite another Act for this surplus the Writ shall not abate. 3. The Prince had the Dukedome in Fee, for it is an inheritance, because 21 E. 3. 41. the Princess was indowed, and it is no estate tail because it is not limited of what body it shall come, but only that they shall be Heirs to the black Prince. 4. Against the general statute *Natiel recorde* shall not be pleaded, for although it be lost, yet the Judges ought to take notice of it, and this is such an one which concerns the Prince, and the statute of confirmations doth not extend unto it. 1. Because this hath a special relation to certain defects, as Misnomers, &c. 2. Patents are made good only against the King, saving the right of others, therefore the Princes right is saved: In a *Scire facias* the King or Prince may reply, but the most formal way is, for the Attorney to reply, as here he did; No son of the King but his first begotten, shall be Duke of C, although he be heir apparent to the Crown.

Calves Case, 26 Eliz. Banco Regis, fol. 32.

1. **R**Esolved, that to maintain an action against an Inkeeper for goods lost, &c. it ought to be a common Inn. 2. He ought to be a Passenger, therefore a Neighbour shall not. 3. An Inholder shall not answer for any thing, but that which is *infra hospitium*, therefore if a Passenger require that his Horse be put to graze, the Inholder shall not answer if he be stolen, otherwise if he require it not. 4. There ought to be a default in the Inholder or his Servants, therefore if a Guest bring one with him who stealeth the goods, the Inholder shall not be charged; otherwise if the Hostler appoint one with him in his Chamber who doth it. But an Inholder shall not be charged, if he require the Guest to put his goods in a Chamber, and he leaves them in the Court, but it is no excuse to the Inholder that he delivered the key of the Chamber to the Guest, or that no goods were delivered to him. 5. The Hostler shall answer for Charters if they be stolen, but not if a Guest be beaten, and all this appears by the Writ, and the words of it.

Paynes Case, 29 Eliz. Com. Banco, fol. 34.

A Feme, Tenant in tail, taketh Baron, and hath issue, who is heard to cry, and dyeth, the Feme dyeth without issue, the Husband shall be Tenant by the courtesie, for although the state of the Feme be determined, yet it is *Tacite* implied in the gift, that every Husband of a Feme inheritable to the said estate, shall have the land for his life, after the death of the Feme, if he be intituled to be Tenant by the courtesie. If a Feme be delivered of a Monster, this

doth not intitle the Husband to be Tenant by the curtesie; otherwise it is, if the issue had human shape, but is blemished: if a Feme be ripped, and the issue taken out of her womb, the Baron shall not be Tenant by the curtesie; otherwise it is, if the issue which they had dyes, and lands descend after. A man shall not be Tenant by the curtesie, but where his issue may inherit as heir to the Feme; therefore he shall not be of a possession in Law, because there he makes title from the ancestor of the Feme, and not from the Feme.

Barretry 30 Eliz. fol. 36.

A Common Barretor, is a common maintainer of sutes or quarrels, in Courts, or in the Country: As first, in disturbance of the peace. Secondly, in taking and keeping of possession, with force or deceit. Thirdly, by false calumnation and sowing of quarrels; but to indite him of it, it ought not to be, that he hath done so twice or thrice, but that he is a common doer of them.

Grieslies Case, 30 Eliz. com. banco, fo. 38.

BY the custom, one is chosen in a Leere to be Constable, who refuseth, and departeth out of the Court, the Steward imposeth a fine of 5 *l.* upon him, for which the Bayliffs of the Lord distrein, and he brings a replevin.

1. Resolved, every Judge of record may assess a reasonable fine upon any man, who makes contempt or disturbance to the Court, but a Judge who is not of record, cannot.

2. This fine needs not to be afferred, because the statute of *Mag. Ch.* speaks of Amerciaments, and
not

not of fines, for a fine is imposed by the Court, and an Amerciament by the Jury: therefore the Judgment in an Amerciament is general, *quod sit in misericordia*, and after upon estreits directed to the Coroners they are offerred, and the statute is, that a Noble man shall be amerced by his Peers, which is not used at this day, because it is reduced to a certainty; (*viz.*) A Duke to 10 *l.* and another to 5 *l.* but an Amerciament of an Officer of the Court, or he who hath execution of Writs shall be offerred by the Court; so of any who is Judge as Suters: If a Juror appear, and is adjourned to a day, of which he makes default; this shall be inquired by his Companions, for he shall be fined to the value of his land, *per annum*, which the Court cannot know.

3. A distress may be taken for a fine without custom, or for Amerciament which is less.

Whittinghams Case, 45 Eliz. fol. 42.

IT was resolved, that if there be Lord and Tenant an Infant, and the Infant make a feoffment in fee, and execute the same by livery of seisin by his own hands, and after dye without heirs; in this case the Lord shall not have the benefit of the escheat, and the feoffment is unavoidable.

There be three manner of Privities, (*viz.*) 1. Privity in blood. 2. Privity in estate. 3. Privity in Law. Privities in blood, as heirs in blood; Privity in estate, as Joynt-tenants, Baron and Feme, Donor and Donee, Lessor and Lessee, &c. Privities in Law, as Lord by escheat, Lord of a Villain, &c.

If a Lessee for life make a Lease for years, and after enter into the Land, and make waste, and the Lessor recover in an action of waste against the Lessee for life, he shall avoid the Lease for years, made before the

the waste committed. But if a Lessee for life make a Lease for years, and after enter and make a feoffment in fee; the Lessor shall not avoid the Lease for years; and so if a Tenant make a Lease for years, and after is attainted of felony, or dieth without heir, the Lord by escheat shall not avoid the term. But because the feoffment in the case at barr was executed by Letter of Attourney, it was resolved to be void, and the Land escheated to the Queen.

Jehu Webbs Case, 6 Jacobi, Com. banco, fol. 45.

THe King grants the office of the Kings Tennis plaies at W. to one, who being disseised brings an assize.

The Patent shall have a reasonable construction, not only when the King himself plaies, but when any of his Household. As if a Commission be made to take Singing-Boys in a Cathedral Church for the Kings Chappel, those that sing there for their pleasure, cannot be taken, but such as get their living by it. There were but two manner of assizes at the common Law; assizes *De libero tenemento*, and, *De communia pastura*, but for no other common, but for this only there is a Writ in the Register. But the Statute of W. 2. c. 25. giveth it, *De proficuo in certo loco capiendo*, in lieu of a *Quod permittat*, and although that there offices amongst other things are named, yet an assize lay of an office at the common Law, and although that no Tenant for life may have a *Quod permittat*, yet an assize did lye for him, but that is to be understood of an office of profit, for it lyeth not of an office of charge: Original Writs made by Statute cannot be altered without Statute: In an assize of a new office, it ought to be shewed, what profit

belongs to it, but not for an ancient office, because that is sufficiently known.

Syms Case, 6 Jacobi, fol. 51.

Tenant in tail levyeth a fine with warranty, and dyeth, the warranty descends upon the issue of him in the remainder, inheritable to the tail, and another; the issue in tail brings a Formedon, and is barred for all, for the warranty is intire, and barreth every one upon whom it descends, of all his right: as if one seised of three acres maketh a feoffment of one with warranty, and dyes, having issue two Daughters who make partition, the Mother purchaser the part of one, & brings dower against the feoffee who vouches the Daughters; she shall recover all the other acre of the other daughter, if tenant by the curtesie make a feoffment with warranty, and dyes, and his Son heir of the Feme recovers, and assents descends after, the feoffee shall have a *Scire facias*, to have the Land first recovered, by the Statute of *Glouc. c. 3.* But if assents descend to the Heir in tail, bound with a lineal warranty, after recovery in formedon, the Feoffee shall have a *Scire facias*, to have the assents, for otherwise if the recoverer alien the assents, the issue of him will recover the Land in tail again; but in the cases the discontinuee ought to confess the title of the Demandant, and pray, that if assents descend after, they may descend unto him; for if he plead a warranty and assents, this is peremptory unto him, if it be found that assents did not descend: for the statute is, that a *Scire facias* shall issue out of the rolls of the Justices, and in this case there is no ground for the *Scire facias* in the record, but in this case if the issue in tail pleads no assents, and assents are found, but not to the value, the Tenant shall have

have a *Scire facias* to recover the assets descended after, for that false plea of the Vouchee. Warranty and Estoppel descend upon the Heir general, and warranty barreth, although that he upon whom it descends, claimeth not by him that made it, but doth not an estoppel, but estoppels with recompence bind the right of one who claimeth not by him that made it.

Roger, Earl of Rutlands Case, 6 Jacobi, fol. 55.

THE King grants the pannage and hearbage of a Park to M. for life; and reciting this, grants it to the Earl of Rutland for his life.

1. Resolved, the King hath three manner of inheritances, 1. Some which he cannot exercise himself, and cannot grant them in reversion or remainder, as Corodies, and Churches of which he is Patron. 2. Others which he cannot exercise himself, but may grant them in reversion or remainder, as offices. 3. Others which he may exercise himself, and may grant, as Lands, Houses, &c.

2. The King here is not deceived; for when he reciteth here that M. had for life, and grants for life this inureth as by Law it may, that is as a grant in reversion.

3. In this case the grant to the Earl shall commence after the determination of the estate of M. and if the King grants land to one and his Heirs, *Habendum* to him and his Assigns, it is good, and the *Habendum* shall be rejected for the honour of the King. See the Lord Chandos case in the sixth Book, and when a Charter of the King may be taken to two intents good, in many cases it shall be taken to such intent as is most beneficial for the King; but if it may be taken to one intent good, and to another void,

void, then for the honour of the King, and benefit of the subject, then it shall be taken so that it may take effect.

Beechers Case, 6 Jacobi, fol. 58.

By Plaintiff in Debr, *se retraxit* by attorney, and by the judgment is not amerced, he brings error. 1. Resolved, A *Retraxit* ought to be in proper person; for at the common Law, every one who appeared, ought to come in proper person, and make his attorney after, by license of the Court; but if it be without writ, he cannot without a writ of *Attornato faciendo*: In cases where one may make an attorney, but for contempt is bound to appear in person, if he appear by attorney; this is not error, because the Court may dispense with the contempt; otherwise, where he cannot appear by Law by attorney, as here; for if he appear by attorney, this is error. 2. B. ought to be amerced if upon a Non-suit, *à fortiori* upon a *Retraxit*; and although it is for his advantage, yet he may assign it for error, because the judgment is not perfect, and because it is for the advantage of the King, and it shall not be amended, because the act of the Court. 3. Where one disclaims, he shall not have a writ of error, because he hath confessed that he had no right; otherwise it is, upon a *Retraxit*, for this is but a barr of the action, *à fortiori* here, where it was void, done by an attorney, a *Retraxit* ought to be when the party is supposed to be present, therefore it shall not be when he imparleth.

Swaynes Case, 6. Jac. fol. 63.

1. **R**ESolved, the King grants a Mannor for life except Timber-Trees, the Lessees grant copyhold, the Grantees may shrowd Timber-Trees because they come in by custome, *Paramount* the exception. 2. If Copyholders prescribe to take profit in any part of the Mannor, if the Lord aliens it, a Copy-holder admitted after shall have it, because he is in paramount the severance, but he shall prescribe and plead specially, that is, untill such a time, (*viz.*) Before the severance *Talis habebatur, &c. consuetudo, &c.* and then shew a severance.

Sir William Fosters Case, 6 Jac. fol. 64.

C. F. made a feoffment 4 E. 6. reserving a rent-charge, which rent descends to T. F. who dyes intestate, his Administrators avow for it, and alledge no seisin within 40 years, yet good, for the Statute of 32 H. 8. c. 3. that none shall avow for rent if he had not seisin within 40 years, is to be intended when it was necessary to alledge, as upon rent betwixt my Lord and Tenant, for this may be had by incroachment, and perhaps the commencement of the Seigniorie was before time of memory, but where rent is by deed or reservation, as here, or upon an estate tail, the seisin is not material, for the deed or reservation is the Title, and incroachment shall not hurt, and they shall not have a *Ne injuste vexes*, but shall avoyd it in an avowry, and *Magna Charta, c. 10. Quod nullus distringatur ad faciendum majus servitium, &c.* doth not extend to donee in tail, Lessee for life, &c. but is intended between very Lord and very Tenant.

Lovedayes

Lovedayes Case, 6 Jac. fol. 65.

If a Jury who appeareth to try a certain issue, give a verdict which is accepted, be it perfect or imperfect, they are discharged, and shall not try the same issue, upon a new *N. si prim*, but a *Venire facias* *de novo* shall issue, otherwise it is of the Recognitors an assize, they shall try all the issue, because they are not to try any certain issue, and because they come in upon an Original, the Court will not award a new Original, but the Plaintiff shall have a Certificate of assize to try the imperfections, the Plaintiff hath a *Venire facias* against divers, the Sheriff returneth no Writ, the Plaintiff shall not have several *Venire facias* after, for he cannot vary from the

Crograts Case, 6 Jacobi, fol. 66.

The Defendant pleads in barr to trespass that the B. of N. leased by Copy to W. M. to which Condition there is Common in B. and justifieth as servant to the said W. the Plaintiff replies, *De injuria propria, &c.* this is an insufficient replication, for, *De injuria, &c.* hath reference to all the plea in barr, not to the commandement, *Ergo*, if the Defendant in false imprisonment justifie, for that a *Capias* is awarded to the Sheriff, who made a warrant to take the Plaintiff; *De injuria, &c.* is no plea, because it referreth to all, and so record shall be tried by jury, but he shall traverse the Warrant, which is matter in fact, but this had been a good plea, if the proceeding be in a Court, which is not of Record. 2. *De injuria, &c.* is to be pleaded, where the plea is matter of excuse, and not where he claims

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an interest in his own right, or in the right of his Master, for there he shall traverse the Commandment. 3. Where authority is derived from the Plaintiff himself, or is given by Law, as to fee if waste, the Plaintiff ought to answer to it, although no interest be claimed, and he shall not plead *de injuria, &c.* 4. If this plea be admitted here, all parts of the plea in barr shall be tryed, and the issue will be full of multiplicity.

Trollops Case, 6 Jacobi, fo. 68.

THe Defendant in error pleads excommunication, &c. and sheweth the Certificate of the Vicar general, *de D.* the words which were, *universis clericis & literatis per totam diocesim, D.* the Plaintiff pleads the general pardon, 3 *Fac.*

1. Resolved, the official cannot certifie excommunication, for none shall do that, but he to whom the Court may write to assoil the party, as the Bishop and Chancellour of C. or O. and for that, if a Bishop certifie and dye before the return of the Writ, it shall not be received, but the successor shall do it, and one Bishop shall not certifie an Excommunication made by a Bishop in another Court, but a Bishop after election before Consecration may and so may the Vicar general, if it appear that the Bishop is in *Remotis agendis*. 2. The Certificate is insufficient, because by the particular direction to the Clerks of D. the Kings Court and all others are excluded, and so a protection in one Court serveth not in another; and excommunication is such a thing, as the Court of the King hath consufance, and therefore the Sute and the Cause are to be expressed in the Certificate, that the Kings Court may judge of the sufficiency, and if it be insufficient (as if a Bishop certifi

certifie an excommunication made by himself in his own Cause) the Court may write to absolve him. If the Certificate had been good, the point was, whether the general pardon dischargeth an excommunication, or not.

Whitlocks Case, 6 Jacobi, fol. 69.

A Reversioner upon an estate for life, levies a fine to the use of himself, until Marriage of his Son, and then to the use of himself for life, with power to make Leases, so that they exceed not 21 years, or three lives, reserving the ancient rent, the remainder to his Son in fee; the Son is married, the Father maketh a Lease for 99 years, if two shall so long live, reserving rent to him, his heirs, and the reversioners; this is a good Lease.

1. Resolved, he had pursued his authority, for if he had a particular power to make Leases for 21 years, or three lives, he cannot make Leases determinable upon lives, but having a general power to make Leases, so that they do not exceed 21 years, or three lives, he may.

2. The rent reserved goeth to the Son, although that he who reserved it had but for life, because the Lease for years hath no being out of the Lease for life, but out of the Fee, and in judgment of Law proceedeth both in construction upon the limitation of uses; but the most safe way here had been to reserve the rent generally, and left it to the distribution of the Law.

Greenlyes Case, 7 Jacobi, fol. 71.

Baron and Feme, Tenants in special tail, the Baron infeoffeth P. G. and dyeth, the Feme dyeth, the

the son enters, and leaseeth to the Plaintiff.

1. Resolved, if Baron jointenant in special tail with his Wife, had made a feoffment, or had been disseised, at the common ley, and dyed, and the Feme before entry dyed, this is a discontinuance to the son, because he cannot enter as Heir to both, but if the Feme enter, the discontinuance is purged.

2. The estate which the Feme had jointly with her Baron is within the purview of the Statute of 32. H. 8. c. 20. That no fine levied by the Baron sole of Lands of the Feme shall hurt her, and within the Statute of *West* 2. c. 3.

3. The entry of the son is lawful, although he claims not as Heir to the Feme, as the Statute speaks, but as heir to both, because he is within these words, [or to such as have right by the death of such Wife,] and this is to be intended of discontinuances made by the Baron, and not of a rightful barr of the issue, for they cannot avoyd it, and the Statute is that they may enter, which they cannot do where they are barred: and if the Feme enter within five years, as she may after a fine levied by the Baron, this doth not take away the future barr of the issue, and if she enters not within five years, she also is barred: Baron, tenant in tail, the remainder to the Feme in tail, makes a feoffment, the Feme may enter after his death, by this Statute, but if the Baron suffer a recovery she shall not enter, in the Case at barr the son may have a *Formedon* at the common Law, and where before this Statute a *Cui in vita*, or *Sar cui in vita* did lye, entry is given by this Statute, and not otherwise.

The Lord Staffords Case, 7 Jac. fo. 73.

THe Queen reversioner upon an estate tail grants the reversion to T; T. in tail upon condition, is to have *Prædictam reversionem* in fee, the condition is performed, the Lord Stafford Tenant in tail levyeth a fine, his issue is barred. 1. Resolved, that a condition of accruer may be annexed to a thing which lyeth in grant, and to an estate tail, as if Lessee for life be the remainder for life, with condition of accruer to the first, this is good, and yet no Merger of estate: Four things are requisite to an accruer. 1. A particular estate as the Foundation, *ergo*, a Lease at will shall not be. 2. The estate ought to continue in the Grantee until accruer, therefore if the Grantee alien and purchase, the condition is Tolved, but *Quære* if the Tenant alien upon condition which is broken, if the fee shall accrew, but Grantee may grant part of his estate, as if Lessee for life make a Lease for years, he may perform the condition after, so may Tenant in special tail, after he is become tenant in tail after possibility, &c. so may the surviving jointenant and the heir of Tenant in tail. An instant is sufficient to support an accruer, as if the condition be, if the Lessee be ousted *eo instante* that the ouster is, the fee accrueth; but if Lessee for years accept a confirmation for life, the condition is gone: but it is not necessary, that the estate of the Grantor or Lessor continue, because by his own act he shall not defeat his grant. 3. It ought to vest at the time of the condition performed or never, and for that, rather that it shall not vest at this time by performance of the condition, the fee without office or other ceremonies shall be divested out of the King. 4. It is necessary that the particular estate and the condition, because the

deed, or two deeds delivered at the same time, for in Law they are but one grant, and by the condition performed, he had fee from the delivery.

Resolved, *predict. reversionem* signifies the reversion which the Queen had, *Viz.* That which depends upon both the estates tail, and so was the intent; also she granted, *Omnia præmissa*, which maketh it cleer. Resolved also, that these words Will and Declare, do amount to a Grant, and are so used in Patents of Liberties, and things to take effect in *Future*. Tenant in tail the remainder in tail, the remainder to the King; Tenant in tail suffers a recovery, this doth not barr the remainder in tail, because the issue in tail is not barred, and therefore the reversions and remainders in tail are preserved by the Statute of 34. H. 8. c. 20.

Lastly, Resolved, If the reversion in fee had remained in the Crown, that the fine levyed by *Edw. Lord Stafford* the Father, had not barred the Lord that now is. *Notlyes Case*, 31 *Elix. Com. Banco.*

Wiat Wiolds Case, 7 *Jacobi*, fol. 78.

W. W. seised of Land, to which he had common appurtenant, aliens 5. acres to one who in replevin counts, that he and those whose estate he, had in the said 5. acres, have had common there, &c. and good. 1. Resolved, although by purchase of part of the Land in which, &c. the common appurtenant is destroyed in all, yet it is not so by alienation of part of the Land, to which but all remains without damage to the tenant of the Land, 2. That the pleading of it was sufficient.

Vinyors Case, 7 Jacobi, fol. 80.

One was bound to stand to the award of W. R. and revokes the submission, the Obligee brings Debt. 1. Resolved, the Countermand is good, for an authority Countermandable by the Law, cannot by any way bee made irrevocable. 2. Although that the Plaintiff doth not show, that the Defendant had given notice to the arbitrator, yet it is good, because this is implied, for without notice the revocation is voyd. 3. The Obligation by the Countermand is forfeited, because he doth not stand to, &c. when he Countermands it. 4. By his own act he had made the condition impossible, *Ergo*, the Obligation is single. If one bindes himself to give License to carry Wood, &c. for a certain time, if he give it; and disturb him, the Obligation is forfeited.

Sir Richard Pexhalls Case, 7 Jac. fol. 83.

Sir R. P. seised of Lands, part whereof is holden *in Capite*, deviseth 100 Sheep, 10 Bullocks, and 10 *l.* quarterly, to one with clause of distress; and that the grantee shall hold his Courts for his life; for rent arrear for two years, the grantee avoweth. 1. Resolved, a devise of rent out of all is good, and taketh effect out of two parts, and as to the third is void. 2. The grantee shall have an estate for life in the rent, and so he shall if it be granted by deed; also by the intent of the Devisor it appears, that the Grantee shall hold Courts, and have 10 *l. per annum*, for his wages, and quarterly here had relation to rent only, because the word *Et*, disjoineth it from Sheep and Bullocks, and judgement given for the Avowant.

Buckmers Case, 7 Jac. fol. 86.

T. B. gave a House in Gavelkind to M. his eldest Daughter in tail, the remainder of one Moiry to J. a second Daughter in tail, the remainder of the other Moiry to K. a third Daughter in tail; with cross remainders to J. and K; M. discontinueth and dyeth without issue, J. dyeth without issue, K. dyeth, and her issue brings a Formedon in the remainder, and good, although several remainders, for they depend upon one estate, and commence by gift at one time: In actions real, in which title is expressed, a man shall not have one Writ for Lands to which he had several Titles, as in Escheat, Cessavit, Writ of Mesne, &c. but he may have a writ of ward of Land only, although it be by several Tenures, not one Formedon upon two distinct gifts, where the foundation is several, but he shall have it if there be one gift, although it take effect at several times, because the foundation was joint and single, as upon a gift in tail, to Brother and Sister, who dye without issue, or if the Brother dye without issue, and the Sister dye having issue, who dyes without issue. he to whom the remainder limited shall have one Formedon, although it vests at several times; so in an estate tail to Father and Son, and so here: In actions real, founded upon Torte, a man shall have one Writ to recover Lands, to which he had several Titles, as in an assize, a Writ of entry, &c. but in a writ of entry upon disseisin made to my Mother, and her Sister Coperceners, because their title is in the writ, it appeareth he ought to have several actions; but in personal actions, one may comprehend several torts, and causes of actions, as trespass for trespass made at several dayes and places, waste upon several Leases,

Leases, and so of Debt. *Nota*, if a remainder be executed, issue in remainder shall not have a Formedon in remainder, but in the descender, and Count of an immediate gift, but if there be a Lease for life to one, the remainder in tail to A. the remainder in tail to B: A. dyes without issue, if B. be chased to his formedon, he shall not count of an immediate remainder, but shall shew the first remainder to A. and that he is dead without issue. 2. In formedon in the remainder or reverter, omission of issue inheritable in the pedigree of the demandant, abates the Writ, but not upon the part of the particular Tenant. 3. The demandant must make mention of the Son who survived the Father, to which Son the Land descended, but was not seised by force of the tail, but he shall name him Son, but not Heir. 4. The Demandant in a formedon in the descender must make himself heir to him that was last seised, and he to the Donee. Note here, because K. was never seised, the Writ shall say *Remanere*, not *descendere*, and the Writ was, *Remanissus*, because of discontinuance, otherwise it should be *Tenementa remanserunt*.

Frances Case, 7 Jac. fol. 89.

THe Plaintiff pleads in barr of avowry, that R. F. devised to I. his Son, who leased to him; the avowant replyeth, that after the devise, R. F. made a Peoffment to the use of the said I. upon condition, that he shall suffer his Executors to take away his goods, and the estate limited to him was for sixty years, if he should so long live, with diverse remainders over, and that after the death of F. I. hindered the Executors, to carry away the goods, whereupon T. in remainder entered, and judgement given for the Plaintiff.

1. Resolv. Although the condition be taken strictly, the uses to I. only, and to his heirs, are only avoided by it. 2. A disturbance by parol is no breach of the Condition, and because the avowant did not shew a special disturbance, his replication was voyd, 3. I. ought to have notice of the condition being a Stranger to it, or otherwise he cannot break it, as a Coppy holder shall not forfeit for denial of rent, to him to whose use a Mannor is transferred before notice, but he who bindes himself to doe any thing must take notice at his peril, because he hath taken it upon him 4. Although that the Title which the Plaintiff had made in barr to the avowry, be destroyed, yet he shall have judgement, because his count is good, and another Title (that is, to have the Land for sixty years, by force of the uses declared upon the feoffment) is given unto him by the Replication, although that the Title which he made for himself be destroyed, yet the Court must adjudge upon all the record, and judgement was entred for him accordingly.

Edward Foxes Case, 7 Jacobi, fol. 93.

A Reversioner upon a Lease for life, the remainder for life in consideration of 50*l.* demiseth, granterth, &c. his reversion for 99 years, rendring rent, this is a bargain and sale, and there needs no attornment, for the words of bargain and sale are not necessary, if there are words which tantamount, as if at the common Law one had sold his Land, an use had been raised to the Vendee, because their intent so appeared, so here; but if it appear, that their intent was to passe it at the common Law, as if a Letter of Attorney be made to make livery, the use had not risen; and here appeareth their intent to passe it

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as a bargain and sale, because rent is reserved presently, therefore it is reason that he shall have the rents of the particular Tenants presently, which cannot be if it passe not by bargain and sale; and inrollment is not necessary, because a term for yeares only passeth in this case, and no freehold. See Sir *Roland Heywards Case*, 2 Report fo. 35.

Matthew Mannings Case, 7 Jac fo. 94.

Lessee for years is bound in 200 Marks to W. C. and deviseeth to his Wife for life, and after her death to M. M. and makes his Wife Executrix, who agrees and dyeth intestate. M. M. enters, and takes administration of the goods, nor administered; W. C. brings Debt against him. Resolved, that M. M. takes by Executory devise, and not as a remainder, and the estate limited to him in construction, precedeth the limitation to the Wife, as if he had devised, that if the wife dye within the term, that then M. M. shall have the residue, and also devised it to his Wife for life. 2. This case is most strong, because a Chattel, which may vest and re-vest at pleasure of the Devisor, without mischief to the *Præcipe*. 3. A devise of the Term, and Occupation thereof, all one. (*Viz.*) So many years as the Feme shall live, the remainder to M. M. 4. After the Executrix had agreed, the first devisee cannot barr the Executory devise. 5. A man may devise an estate, which he cannot convey by act executed as to his Executors, until his Debts shall be paid, the remainder over, they have a Chattel determinable, upon payment of the Debts, which cannot be at the common Law. If a Sheriff sell a Term upon a *Fieri Facias*, and judgment is reversed, the sale shall stand, otherwise none will buy any thing upon Execution,

cution, and judgement was given for the Plaintiff and affirmed in Error.

Bashpoles Case, 7 Jac. fol. 97.

F. and B. put themselves in Arbitrament for all demands, Sutes, &c. so as the aforesaid award be delivered in writing, &c. at the feast of Saint James, the Arbitrator awards that B. shall pay 22 *l.* to F. B. refuseth to pay F. brings Debt upon the bond to stand to the award, and good: 1. Resolved, that the award was of both parts, for the one was to pay money, and the other to discharge the Debt. 2. Resolved, that whereas the Plaintiff saith, that the award was made *de premissis*, which until the contrary be shewed shall be intended of all: when the submission is general, an award of part is good, for otherwise the parties may conceal one thing and make the award void; but if it be of divers things in special, *ita quod arbitrium fiat de premissis*, an award of part is void, but good without such conclusion; so if two of one part, and one of the other part, submit themselves, arbitrament between one of the one part, and another of the other part, is good.

Sir Richard Letchfords Case, fo. 99.

TENANT by Copy in fee (where there is a custome that the heir after the death of his ancestor, within three Courts and Proclamation made, shall be barred if he claimed not) dyes, his heir beyond the Seas, until three Courts and Proclamation pass, and returns, and claimeth to be admitted, he is not barred no more than by Non-claim upon a fine, *Ergo*, this custome shall be construed, If he be within the realm, of full age, &c. but if he go over the Seas

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after the death of his auncestor, he shall be barred, as in case of a fine. 2. Resolved, although he was not in the Kings service; this is not to the purpose, because by intendment he cannot have notice. But a *Mulier puisne* over the Seas, shall be barred, by the dying, seisen of the Bastard *Eigne*, for the right of the *Mulier* is barred, and the Bastard is made *Mulier*, although that a discent of the disseisor of a rent or thing which lyeth in grant barreth not the disseisee, yet if a Bastard *eigne*, dye seised of it, this barrs the *Mulier*. If two Daughters, whereof one is a bastard *eigne*, enters and dyes, before or after partition, the *Mulier* is barred: Otherwise, if two Daughters, and one of them had no colour of partition, if bastard *eigne* dye in the life of his Father, having issue, who enters after the death of the Father, and dyeth seised, having issue. *Quare*, if the *Mulier* be barred, *Mulier* is barred by descent, before entry of the Son of the bastard *eigne*, as if issue be in *Ventre sa mere*, or the Wife of the bastard endowed.

John Talbots Case, 7 Jac. in Second deliverance, fol. 102.

LOrd and Tenant by Homage, Fealty, and Herriot service of 50 acres, the Tenant infeoffeth the Lord of three acres, and after infeoffeth the Plaintiffs father of three other acres, parcel, &c. who dyeth, the Lord distreineth for Herriot, the Plaintiff brings replevin, and good. 1. All intire services to render an intire Chatel of profit, or pleasure, by alienation of part shall be multiplied, and by purchase of part by the Lord, extinct. 2. Personal services for the publique good, which are intire, as Chivalty, Homage, and Fealty, shall be multiplyed, and not extinct. 3. Other personal services, as Butler, Sewer,

er, &c. shall not be multiplied, but shall be extinct. So of a personal office, and manual labour. 2. There is no diversity between an intire Chattel, be it annual or not, as if it be to render a Horse every five year by purchase of part, it shall be extinct. 3. If the Father of the Plaintiff had been first infeoffed, and then the Lord, the Herriot had remained, because there the Father of the Plaintiff, held by a several Herriot before the Lord was infeoffed. 4. But Herriot custome, by purchase of part is not extinct.

Doctor Bonhams Case, 7 Jac. fol. 114.

THE President and Censors of the College of Physicians in L. by colour of Letters Patents of H. 8. and the Statutes of 14. H. 8. and 1. Mar. fined and imprisoned Doctor Bonham, for practising of physick in L. without their allowance, (the fine to be paid to them,) and also for contempt made to the Colledge, whereupon he brings false imprisonment, and adjudged for the Plaintiff.

1. Whether a Doctor of one University or other, be within the act.

2. Admitting that he is, whether he be within the exception in 14. H. 8. Justice Daniel held, that such a Doctor was not within the body of the act; and if he were, yet he is within the Exception, but Warburton *è contra*, for both points: Cooke spake not to them, but they all agreed that the Action was maintainable for two other points.

1. Whether the Censors have power to fine and imprison.

2. Admitting that if they have pursued it, The Censors have no power in this case to imprison the Defendant, for they have no power to punish by fine and Imprisonment, those who practise without their

license, but those practisers who misadminister physick

1. Because the clause that none shall practise without their License, and the clause which giveth to them the said power, are distinct clauses.

2. The first clause imposeth another penalty, and 5 l. every moneth that he practiseth, but leaveth the evil administration of Physick to be punished by the Colledge, because this is uncertain.

3. To make one punishable by the first Branch, he ought to practise by a moneth; otherwise it is, by the second.

4. By this way they shall be both Judges and parties in one cause.

5. If Doctor B. shall be punished by 5 l. by the moneth, and also at their pleasure, he will be often punished for one offence. 2. Admitting that they had power, yet they have not pursued it. 1. Because the President, who hath no power, joined with them. 2. The fine was imposed for not appearing before the President, and Censors, and the President had no power, 3. Half of the fine belongs to the King; and here all is to be paid to them. 4. The Imprisonment ought to be presently, as upon the Statute of *W. 2. cap. 12.* 5. Their authority being by Patent and Statute, their proceedings ought not to be by Parol; and the rather, because they claim authority to fine and imprison.

6. It shall be taken strictly, because against the liberty of the Subject, therefore before 1. *Mar.* the Goaler was not bound to receive them; and this doth not enlarge their power, but that the Goaler shall forfeit double the Amerciament, if he refuse. Admitting the replication voyd, although that the Colledge demurr upon it, yet the Plaintiff shall have judgement, because in the barr, the Defendants have shewed that they have imprisoned him with.

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without cause, for upon all the pleading, it appear-
eth, that he had cause of action; but if a barr be
insufficient, and by the replication it appears, that
the Plaintiff had no cause of Action, he shall not
have judgement: A Count may be made good by
barr, and a barr by replication in matters of circum-
stance, but not of substance. See there seven things
observed by *Coke*, for the better direction of the Pre-
sident and Comminalty of the said Colledge here-
after.

The Case of the City of London, 7 Jac. fo. 121.

IT is a good custome within a City, that a Foreiner
within the said City shall not sell things by re-
tail, and it is good also upon pain of 5 *l.* but it is not
good by Charter; therefore Cities which are incor-
porate within time of memory, cannot have such pri-
viledges without Parliament: so of a custome, that
goods forein bought and forein sold, shall be for-
feited: so one may prescribe to have a Bake-houise
in a Town, and that no other shall have one there,
and the Statutes which provide that every one may
sell in retail, or in gross, extend only to Merchants,
Aliens and Denizens, who export and import things
vendible. Three inconveniences by confluence of
people to *London*, &c.

The Case of Thetford-School, fol. 130. 8. Jac.

LAnd of the yearly value of 35 *l.* in *An. 9. El.*
was devised by the will of *Thomas Fulmerstone*, to
certain persons and their Heirs for maintainance of a
Preacher four dayes in the year, of the Master
and Usher of a free Grammar School, and four
poor people, *Viz.* Two men and two women; and

a special distribution was made by the Testator, amongst them of the said Revenues, (*Viz.*) To the Preacher one certain Sum, to the School-master and Usher other certain Summes, and to the Poor, &c. amounting in *Toto* to 35 l. *per annum*, which was the annual profits of the Land at that time; and after, the Lands became of greater value. (*Viz.*) 100 l. *per annum*. Question, whether the Preacher, School-master, Usher, and Poor, should have only the Summes appointed to them by the Founder, or that the renew and profits of the Land shall be employed to the encrease of the Stipends of the preacher, School-master, &c. or in what manner the surplusage should be employed. And it was resolved, that the revenue and profit of the said Land should be employed to the encrease of the Stipend of the Preacher, School-master, Usher, and Poor; and if any surplusage remain, the same to be expended to the maintenance of a greater number of poor, &c. and nothing thereof to be converted to the Devisees, or their own use: and this resolution is grounded upon apparent reason, for if the Lands should decrease in value, the Preacher, School-master, &c. should lose; so when the Lands do increase in value, (*Pari ratione*) they should gain, *Vide Statutum Templariorum, ita semper quod pia & celeberrima voluntas donatorum in omnibus teneatur & perpetuo sanctissime perseveret.*

Turners Case, 8 Jac. Com. Banco, fol. 132.

IN Debt against an Administrator he pleads recoveries had against him in the Court of C. which amounts to all which he had in his hands; the Plaintiff replyeth, that one is by Covin, and that the other recoverer had accepted a composition, and that the

the Defendant delayed to accept a Release to defraud the Plaintiff: adjudged for the Plaintiff. 1. Although that two recoveries are without covin, yet the composition so operates, that nothing shall be accounted administred, but only so much as he hath paid by composition, and the converting of any part to his own use, and the deferring to accept a Release, is against the office of an Executor, and shall not aid him. 2. The barr is insufficient, because he hath not shewed that the Court of C. had power to hold plea of debt. 2. Because he hath not shewed that the Testator was bound in an Obligation; and if it were only upon contract, the Administrators were not chargeable in debt. 3. Be the replication evil, yet because the Barr is insufficient, the Plaintiff shall have judgement, because he had not shewed any thing against himself, but if it appear by the replication that he had no cause of Action, he shall be barred.

Mary Shipleys Case, 8 Jac. fol. 134:

AN action of Debt against an Executor of 200*l.* the Defendant pleaded, *Plene administravit*; the Plaintiff replies, that the Executor had assets; the Jury found assets to the value of 172*l.* judgement was given to recover the whole Debt of 200*l.* and damages, and costs of the goods of the Testator. S. &c. *Et si non*, then the damages of the proper goods of the Defendant.

Sir John Nedhams Case, 7 Jacobi, Com. Banco, fol. 135.

IN debt as administratrix upon administration committed by the Bishop of R. the Defendant pleads ad-

administration committed unto him by the Dean and Chapter of C. *sede vacante*, because the Intestate had *bona notabilia*, &c. the Plaintiff replies, that that administration was repealed: *adj.* for the Plaintiff.

1. *Resolv.* Because it is not shewed that the Intestate had *bona notabilia*, &c. it shall be intended that he had not, and yet the administration is not voyd, but voidable.

2. Before the repeal of administration committed by the Metropolitan, the inferior Ordinary may commit administration, because this is by the repeal declared voyd, *ab initio*, and an administration is but an authority which may well commence *in futuro*.

3. The committing of administration to the obligor hath not extinguished the debt, because it is in anothers right; otherwise it is, if the Obligee himself make the Obligor his Executor, because this is his own act, *De bonis defuncti tria dispositio*, 1. *Necessitatis, ut Funeralia*. 2. *Utilitatis*, that every one shall be paid in due order. 3. *Voluntatis*, as Legacies.

Sir Francis Barringtons Case, 8 Jac. *Communi Banco*, fol. 136.

THE Lord R. granted wood within a Forrest, in which the Plaintiff had common, which grant is confirmed by Statute, the grantee cuts wood, and incloses it, the commoner shall lose his common for seven years.

1. *Resol.* The grantee had an inheritance to take in another soyl, and the soyl is to the Lord R.
2. Although the grantee had not the inheritance, yet the Statute extends to him, and he may inclose; for the Statute is, or any other person to whom wood is sold, 3. 22, E. 4. cap. 7. extends to wood which
one

one had in severalty, and not where another had common there: for at the common Law, one who had wood in a Forest cannot inclose against a Commoner; but if it be his several wood, he might inclose, *parvo fossato, &c.* for three years.

4. The said Statute is as a conveyance between the King and his Subjects, which taketh not away the right of third persons, as the Commoner here is.

5. In the said Statute there is a clause that he may inclose without suing to the King, or other owner, so that power is given against them, and not against a Commoner, Beasts of Forests are Hart, Hind, Hare, wild Bore, and Wolf: of Chase, Buck, Doe, Fox, Martin, and Roe.

6. By the Statute of 35 H. 8. cap. 17. he is barred of his Common, which provideth that no Beasts shall be suffered to come there for seven years.

7. The Statutes which concern Forests are general, because they concern the King, and the Court shall take notice of them.

Doctor Druries Case, 8 Jac. fol. 141.

DOCTOR Drury recovers against B. who is outlawed, and taken by *Capias utlagatum*, and escapeth, the Utlary is reversed, Doctor Drury sueth execution, B. brings an *Audita querela*, adjudged that it lyeth not. It was resolved, that if A. be in execution at the sute of B. upon an erroneous judgement, and after escape, and after the judgement is reversed by a Writ of error, the action against the Sheriff is extinct, for he may plead *Nul tiel recorde*: But until it be reversed, it remains in force, be it never so erroneous; and if the party have judgement and execution upon the escape against the Sheriff or Goaler, and after the first judgement is reversed, yet forasmuch

much as Judgment upon this collateral thing is executed, it shall remain in force: notwithstanding the reversal of the first, 7 H. 6. 4. Yet it seemeth to me, he have may remedy by *Audita querela*, for that the ground and cause of the collateral action is disproved by the reversal of the first Judgment, a difference between mean acts, compulsory, and voluntary, and between a recovery by eigne title, and reversal of a recovery.

Davenport's Case, 8 Jacobi, fol. 144.

Tenant for years of an avowson granteth *proximam advocacionem & donationem, si eadem Ecclesia contigerit vacuare, durante termino, &c.* and afterward surrenders his term; yet if the prochein avoidance be within the term, the grant is good; for years cannot determine, but the effluxion of time, and the Law implies a limitation; if the Church do become void, during the term: For *expressio eorum qua tacite insunt, nihil operatur*: Likewise if a Lessee for years grant a rent-charge, and after surrender; yet for the benefit of the grantee, the term hath continuance, although, *in rei veritate*, it is determined, and the grantor himself shall not derogate from his own grant, to make it void at his pleasure.

The Six Carpenters Case, 8 Jacobi, fol. 146.

IT was resolved, when entry, authority, or license, is given to any by the Law; and he abuse the same, in this case he shall be a Trespassor *ab initio*: But where entry, authority, or license, is given by the party; and he abuse the same, there he shall be punished for his abuse; but he shall not be said to be a trespassor *ab initio*; and the diversity is this, because

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the

the Law doth judge by the act subsequent, *quo animo*, or to what intent he enters, *acta exteriora indicant interiora secreta*: But when the party giveth authority, &c. to do a thing, he cannot for any subsequent cause punish the same.

1. The Law doth give authority of entry into a common Inn, Tavern, &c.

2. The Lord to enter and distrein.

3. To an owner of the Soyl, to enter and distrein damage-feasant.

4. To him in reversion, to view if waste be committed.

5. To a Commoner to enter into his Land to view his Cattel, &c.

But if he that enters into an Inn, &c. do trespass, or take any thing away; or if the Lord that distreins for rent, or owner for damage-feasant, labour, or kill the distress; or he that enters to view waste, bruise the house, or stay there all night; or if a Commoner fell Timber; in these cases, and such like, the Law judgeth that he entred for the same purpose; and therefore the act that doth demonstrate, this is to be a Trespass, and he shall be a Trespassor *ab initio*: It was resolved, that the *non-feasons*, or not doing of a thing, is not any Trespass, where the Law giveth license or authority to enter, (*viz.*) to deny to pay for Wine in a Tavern, is not a Trespass, but the Taverner may have an action of debt, 12 E. 4. 8. If a Taylor over-value the making of a garment, and the necessities thereunto, he shall not have an action of debt for his own values, unless it be specially agreed upon before, but he may detain the garment, until he be paid or satisfied; and if the party sue for the same, the Jury shall set down the value, and the Taylor shall have no more, but be barred for the rest: Likewise

an Ostler may detain an Horse, &c. Tender of sufficient amends for damage-feasant, before the distress taken, is good, and the taking of a distress afterwards is wrong; tender after the taking of a distress, and before the impounding, maketh the detaining wrong, but not the taking; but tender after the impounding cometh too late, for then the cause is put to the tryal of the Law.

Edward Althams Case, 8 Jacobi, fol. 150. In Dower and pleaded.

N. Seised in fee of Lands in W. and G. deviseth the Lands in G. to his younger Son for life; it was agreed between the eldest Son, and the Widow of T. N. that she should release her Dower in W. she releaseth unto him, *Omnes actiones demand, &c. nec non omnem dotem & titulum dotis, &c. de aliquibus terris in W.* both the Sons dye, she brings Dower of the Lands in G. and judgment given for the demandant.

1. *Resol.* A Release of all actions to him in the reversion barreth not Dower, because she had no cause of action against him, but against the Tenant of the free-hold; but a release of all her right to him in the reversion extinguisheth Dower; for a release of right barreth actions, but a release of actions barreth not a right, if there be other means to come to it; otherwise not; as if the disseisor release all actions to the heir of the disseisor, the right is extinct; otherwise it is if the release be to the disseisor, and a dissent after; or if the Release be to the Lessee for life of the heir; a Release of all actions real and personal, is no barr in a Writ of Errour, but a release of a Writ of Errour is; a release of actions is no barr to have Execution; if he be not put to a *Scire facias*,

a release of a thing due before the time of payment thereof, is good : *Querela* is more than an action, for by that the cause of action is released ; by release of fines, executions are barred, for none shall have execution without fine for it, so it is of all duties ; but a release *de querelis infectis*, in that case barreth not dower ; by release of titles dower is barred, and by release of demands, which is the most ample release of all.

2. The collateral agreement is not of any force or effect, but general words ought to be qualified by apt words contained in the same Deed, as in this case, *in continget per mortem dicti T. viri mei de aliquibus terris in W. &c.* and so extends not to any Land in G. but restraineth the general words to the Lands in W. only : *Quando carta continet generalem clausulam, postea descendit ad verba specialia, qua clausula generali sunt consentanea, interpretanda est carta secundum verba specialia* : As if a man grants a rent in *manerio de D. percipiendum*, in 100 Acres parcel thereof, with clause of distress in the 100 Acres, the rent shall issue out of the 100 Acres only.

Arthur Blackamores Case, 8 Jacobi, fol. 156.

THE Defendant is named Gent. in the original Writ, but by negligence of the Cursitor he is out-lawed by the name of Knight; this is amendable at the Common Law ; but in case of the King, default of the Court was amendable at the Common Law, as erroneous entrance of the continuance, essoyn, &c. and any part of the Record the same term ; and therefore divers Statutes of amendment were made, one of the last whereof was, 8 H. 6. cap. 12. which was more large, and extends to process, and to seven other things, to Records, Pleas, Parols,

Parols, Warrants of Atturney, to Writs original and judicial, Pannels, and Returns; that is, where it was the mis-prision of the Clerk, and only the default of the Clerk by negligence is amendable, but not by his nescience; as if an action be brought against executors in the *debet* and *detinet*; or if it be false Latin: but if a word which is not Latin be written for a Latin word, this is amendable, as *Imaginavit*, for *Imaginatus est*: in a Writ of Trespass against divers, if it abate for default against one, it shall abate against all; but if it be for matter in fact only, as for mis-naming one Defendant, it shall abate only against him; omission or addition which doth not alter the form, is amendable, as if *Dei gratia* be omitted: Voluntary or negligent keeping of Records by the Clerk, is amendable by other parts of the Record, or by exemplification: Count or plea in barr, &c. which wanteth substance, shall not be amended in another term, but default in the colour (because this is the default of the Clerk) shall be; a Record shall be amended in another term by the Paper-Book, and a thing apparent to be the fault of the Clerk, shall be amended in another term, as *rien tnydoit dei hoc*, &c. & *predictus son proquerent*. *Nisi prius* shall be amended by this statute, if power be given to the Justices to proceed, otherwise not; as if issue joyned in the Record be mistaken in the *nisi prius*, it shall not be amended, but mis-prision of damages shall be, because this is not material to the issue, and it is the default of the Clerk: Warrant of Atturney, and Returns, are amendable by this statute, but if there be none at all, it is out of the statute; and because this statute leaveth many cases without remedy, the statutes of 32 H. 8. cap. 30 and 18 El. cap. 14. were made: Ten mis-prisions as yet not remedied.

1. Variance material between the original and the Count.
2. Want of substance in the original or Count.
3. Insufficient Tryals.
4. If a Coroner returns the Jury where the Sheriff ought.
5. Lack of name of the Sheriff to the return.
6. Where no return is indorsed upon the *Venire facias*.
7. When one who is not returned, giveth a Verdict.
8. Pleas of the Crown.
9. If it appear to the Court, that he who hath a Verdict, had no cause of action.
10. Errour in Law.

Cases in the Court of Wards.

Mights Case, 7 Jacobi, fol. 163.

1. **R**esolved : If I. M. purchase Lands to him, and an Infant in fee, it cannot be averred that this was to take away the Wardship, because he never was sole Tenant to the King.

2. No feoffment that I. M. can make of his Moity, can be averr'd to be by collusion, &c. because without feoffment no Wardship shall be ; and also the Statute speaks of sole seisin.

3. A feoffment to the Wife or younger Child cannot be averred to be by covin, &c. upon construction of the Statute of 32 & 34 H. 8. where collusion cannot be averred by the Statute of *Marlebridge*, it cannot be now to seize all the Land, but it may be for the third part which belongs to the King : If a third part be left to the King, no averment of covin

covin may be for the other two parts, the Father makes a feoffment to divers uses, the remainder to his second Son, and dyeth, his eldest Son dyes, the second Son shall not be in ward by averment of covin.

Digbies Case, 7 Jacobi, fo. 165.

TENANT of the King conveys his Lands to the use of himself for life, the remainder to his Son and Heir in tail; and after is attainted of Treason, the King shall have no wardship of any part of the Land by 32 & 34 H. 8. because there is no heir, and livery must be sued in the name of the heir; but the King shall have wardship in such a case before 26 H. 8. because there was an heir.

The Earl of Cumberlands Case, 7 Jac. fol. 166.

E. 2. granted the Castle and Mannor of S. in tail to R. C. H. 6. granted the reversion to T. C. if the tail be good, if not, he grants it in possession; this is good one way or other, and so are many patents from time to time.

Paris Stoughters Case, 7 Jac. fol. 168.

B_Y *Mandamus* it was found, that P. S. dyed seised 40 El. and held of the Queen in common socage, 7 Jacobi a *Melius inquirendum* was awarded, whether he held of the King by common socage, or in chivalry, and it is found that he held of the Queen by chivalry. This Writ of *Melius*, &c. is repugnant, and giveth no authority to find this Office, because a Tenure cannot be of the King, in the time of Queen Elizabeth; and therefore a new Writ shall be awarded.

ed; but if the first *Melius* be good, no other shall
 issue. 1. For avoiding Infiniteness. 2. A *Diem clau-*
si, &c. shall not issue upon a *Diem*, &c. Nor a *Man-*
damus upon a *Mandamus*; so a *Melius*, &c. shall not
 issue upon a *Melius*, &c. 3. If an office be found
 against a subject, he shall have a traverse; and if up-
 on that it be found against him, he hath no remedy:
 So the King shall have but one office, and a *Melius*,
 and no more, although that a tenure be found of two
 subjects, or one that hath an *Overseer* *le maine*, the
 King shall not relesse without a *Scire facias*; in right
 of the King. *Toursons Case*, 3 *Jacob*, fol. 178.

IF Tenant of the King commit Felony, 1 *Jacob*,
 and after is attainted *An. 3.* for the same; and after
 in *An. 4.* all is found by office. Now this office
 shall have relation to the time of the Felony, to
 avoid all mean alienations and incumbrances, but
 for the mean profits it shall have relation to the
 time of the Attainder; for then the Kings title ap-
 peared of Record, and the like Law is of an *Idiot*.
 But in case of a ward within age, the King shall have
 the mean profits from the death of the Auncellor;
 because he hath it by reason of his Seigniory, and
 he loseth the rent and services in the meantime; the
 difference is, when the King seiseth *jure protectionis*
regie, or *Nomine dispositionis*, and when *Ratione Pri-*
vis recti *feudatuli*.

Sir Gerard Fleetwoods Case, 8 *Jacob*, fol. 171.

Sir William Fleetwood, receiver of the Revenues of
 the Court of wards, in *Anno 35. Eliz.* was pos-
 sessed of a Messuage, and certain Land in *Harrow* in
Com. Mid. for a term of years; in *Anno 36. Eliz.*

he

he became a receiver general, and was bound in 20 Obligations of 200 *l.* a peece to make true Account, &c. And after upon several accounts he became indebted in great summs of mony to the Queen, and being so indebted in consideration of 1100 *l.* did bargain and sell the said lease to *James Pemberton*, which by mean conveyance came to *Sir Gerard Fleetwood*. Question, Whether this lease, &c. was extendable and liable to the Kings debt, &c. and it was resolved, that the said sale of the term was good against the King, because the term was but a Chattel, and the sale of the Chattels after judgment, *Bona fide*, is good, but not after Execution awarded.

And *Cook*, Chief Justice, said, That a Receiver, or other a comptant which is indebted, shall not be in worse case than a Felon or a Traitor, that may after Felony or Treason, and before conviction, sell, *Bona fide*, for his sustenance, &c. his Chattels, either real, or personal.

Hales Case, 8 Jacobi, fo. 172.

THe Heir Ward comes to full age, and tenders his Livery, and bargains, and sells, and dyes, the interest of the King is determind, and Bargainee shall not answer for the mean profits; for the Heir had done all that he could do, and no default in him, otherwise if he had not tendred it.

Sir Henry Constables Case, 8 Jacobi, fo. 173.

THe Son of the Tenant of the King is made a Knight in the life of his Father; the Father dyes, the Son within age tenders his livery, by that, the mean profits are saved, and the King shall not have the rates within age.

Virgil

Virgil Parkers Case, 8 Jacobi, fol. 173.

Virgil Parker seised of the Mannor of *Fusbell* in the holden of the King in chivalry of his Dutchy of *Lancaster*, maketh a feoffment of the one half to the use of himself for life, and after to the use of *Mary Coney* (whom he intended to marry) for her life for her joynture, and after he married her, and then leased the other half to I. C. for years, for payment of his Debts and Legacies, and dyed, his heir within age. Question; Whether the King should have the third part out of the Mannor so leased only, or out of the whole; and it was resolved, that it shall be out of the whole Mannor, although the state of the Wife was precedent, that is, equally out of both parts.

The End of the Eighth Book.

THE



THE NINTH BOOK.

*Dowmans Case, 28 Eliz. Comuni
Banco, fol.7. an Assise pleaded.*



He Defendant in an assize makes Title by a recovery, suffered by P. V. to certain uses, the Plaintiff confesseth the recovery, and saith, That it was to the use of the said P. in fee, and traverseth that it was to the uses mentioned by the Defendant, the Jury

found that it was suffered as the Defendant had alledged, and that by Indenture subsequent, the intent of the parties was declared by them to be as the Defendant had alledged, adjudged for the Defendants.

1. Resolved : That this subsequent Indenture directs the uses of the precedent recovery by Estoppel against the Recoveree, and his Heirs ; and although that it be granted, that a deed is requisite to the privilege without impeachment of waste, yet the estate without deed is good : No averment can be taken, that the recovery was to other uses than are mentioned in a precedent Indenture, otherwise in an Indenture subsequent, because, if uses were declared by a precedent Indenture, no Declaration after shall devest them : so if P. V. had charged the Land, and then

then had made such a declaration, this shall not de-
vest estates of grantees, &c. but no declaration, being
he uses by declaration subsequent, be divested.

2. In all actions between all persons, and in all is-
sues the Jury may give a verd. & at large, and the
statute of W. 2. cap. 30. which giveth it in Assize, is
but an affirmance of the Common Law, but a Jury
cannot find a thing impertinent to the issue.

The death of Sir *James Eyre*, Chief Justice of the
Common Pleas, with an ample and memorable En-
comium of him by Sir *Edward Cook*, &c. *Vixit post
fœnera Virtus.*

Anna Bedingfields Case: 28 Eliz. fol. 15. In dower.

A Common essoyne is allowable in dower, and the
statute of 12 E. 2. is to be intended of an essoyne
in the Kings service; for the statute saith in preroga-
tion of the right which is properly this essoyne which
is for a year and a day.

2. If the tenant of the King dyed seised of divers
Mannors, and it is found by office that he dyed seised
of one, in dower brought against the Heir of full
age he sueth a *circumspecte agatis*; this extends not to
more than is in the office, for this Writ is in the na-
ture of an *ayde prayer*, and the King hath no right to
seise more than is in the office, and as to this Mannor
it was objected, that it shall be allowed, as well as if
the Heir be within age, for in this case, by the sta-
tute of *prærogat. Regis cap. 4.* that the Feme may be
indowed in Chancery: It was answered, that by the
statute of *Bigamis, cap. 4.* ayd shall not be granted
of the King in that case; and therefore before the
statute of *prærogat.* the King nor other Lord could
not indow the Feme, if the Heir were of full age,
because he is not then Gardian, and the statute of
prærogat.

prærogat. giveth power to the King to indow the Wife in such case, if she will, and not otherwise. Where the Heir pleads to dower, detinue of Charters, they ought to concern the same Land, and this plea is to be allowed, because the Feme who detaineth Charters, is not worthy to have dower, and also for the privity which is between the Heir and her.

2. The Heir ought to shew the certainty of the Charters, or that they were in a Chest.

3. None but the Heir himself shall have this plea, nor the Heir himself, if he cometh in by purchase, or if the Feme had them by his delivery; nor if he comes in as Vouchee having no Lands in the same County; or as a Tenant by receipt, because in these cases he cannot plead as he ought, that he is ready to render dower.

4. A Gardian shall not plead it, because the Charters do not belong unto him; but he may plead detinue of the Ward, and if it be not restored unto him unmarried, the Feme shall lose her dower, and after, the Tenant waved this plea, and pleaded *unques accouple*, in loyal Matrimony, and the Bishop of N. certified, that they were lawfully married, whereupon the Demandant had judgment.

Case of Avowry, fol. 20.

[F there be Lord and Tenant by Fealty, and Rent, and the Tenant make a lease for years, and the Lessee hath done his Fealty, and paid his Rent continually, and yet the Lord distreineth the Peasants of the Lessee for the Rent, and avows upon a meer stranger, as upon his very Tenant.

Question, Whether the Lessee be without remedy, for it is a position in Law, that a stranger to the
avowry

334 *Abb. of Strata Marcella's Case. Lib. 9.*

vowry shall not plead, but *Hors de son fee*, &c. But it was resolved, that the Lessee shall be relieved, and he must alledge, that the Lessor is seised of the Tenancy, &c. and the Lord shall be compelled to avow upon the Tenant, and the false avowry of the Lord upon a stranger, which is not very Tenant, shall not hurt the Lessee against the verity of the case, *quia veritas nihil veretur nisi abscondi.*

If one come to distrein for damage-feasant, and seeth the Beasts, and the owner chase them out, the party may not distrein them damage-feasant, but is put to his Action of Trespas; for the Beasts must be damage-feasant, at the time of the distress taken; he who distreins for services upon fresh sute, may avow upon the Land by the equity of 21 H. 8. c. 19. if the Lord distrein when no Rent is arrear, the Tenant or Lessee may make rescous, and so relieve himself.

*The Abbot of Strata Marcella his Case, 34 Eliz.
fol. 23.*

IN a *Quo warranto* for claiming Waifes, &c. and Felons goods, &c. the Defendant pleaded as to the Felons goods, that the Abbot of S. M. *licite habuit & gavisus fuit* them until the Abby was granted to the King by 27 H. 8. and pleads also, 32 H. 8. c. 20. of reviving of privileges, of Abbies, and that the King granted a Mannor parcel of the Abby, & *tot, tallia, & tanta privilegia.* as the late A. had, to one by whom he claimed by feoffment, and pleaded not the feoffment by Deed: Judgment against the Defendant, for the Queen, it was said, That the Charter of the Defendant was void.

1. Because it appears not what estate the Abbot had.

2. Because

2. Because the Defendant claimeth *Catalla felonum* appendant to a Mannor, because he pleaded a scoffment of the Mannor, and had not pleaded it by Deed, without which the privileges do not pass.

To the first the Court answered, that it shall be intended a seisin in fee until the contrary be shewed.

To the second, no resolution, but it was resolved, that if the King grant a Mannor, & *bona & catalla felonum dicto Manerio spectant*. these pass although they cannot be appendant.

But for the third Exception, Judgment was given against the Defendant: In this case four things worthy of consideration.

1. That ancient Franchises ought to have allowance, as to that, some may be claimed by prescription without record, and some by record only, and a Charter of the latter shall not be allowed, if it be before time of memory, if it be not allowed within time of memory, as allowance in Eyre, or confirmation by the King, but usage will not serve, and no more shall be allowed than are confirmed: Obscure words in these ancient Charters shall be construed according to ancient usage, and not according to usage at this day.

2. A man may prescribe in Franchises lying in point of Charter, with aid of allowance in Eyre, without shewing the Original Charter.

3. If a patent of privileges whereby they are granted in fee, referr to a grant made before to one for life only, this is good, for the relation is to the quality, and not to the quantity of the estate, See there what tryals shall be allowed by Law, such privileges as are ancient flowers of the Crown, as, *bona & catalla felonum fugitivorum*, &c. if these come again to the K. they are merged in the Crown, but not those which were erected and created by the K.

as Fairs, Markets, Parks, Warrens, and the like.

Bucknalls Case, 42 Eliz. com. banco, fol. 33.

IF the Lord avow for other services, then the Tenure is traversable; if for more services of the same nature, the seisin is traversable: for he may incroach, and it cannot be avoided in avowry, if it be not for an outrageous distress, but seisin binds not in *Ne injuste vexes*, *Cessavit*, *Affize*, *Rescous*, or *Trespals*, but in them he shall traverse the tenure; but issue in rail, successeur of a Bishop, &c. shall avoid seisin in an avowry, and every one may that can shew a deed of the tenure, but none shall have a *contra formam Feoffamenti*, but the feoffee or his heirs, an incroachment hurteth not, where there is no Tenure; and if an incroachment be of payment at more dayes, if they agree in the sum, it doth not prejudice, Seisin in an avowry is not traversable generally as never seised of the services, because by that means he leaveth no remedy to the Lord by avowry, but in such a case he shall disclaim or plead out of his fee, and so traverse the Tenure: he who denieth seisin after the limitation, must first acknowledge a Tenure, that the Lord may have his Writ of Customs or Services, as if the avowry be for Rent, Fealty, and Sute.

Henflowes Case, 42 Eliz. fol. 39.

AN Action of Debt was brought against Gage, and others as Executors, one of the Executors refused before the Ordinary the probate, and therewith of the Executors proved the Testament; it was adjudged, that notwithstanding that refusal, he may administer the Will afterward at his pleasure; for when

when many are named Executors, and some of them refuse, and other some prove the Testament; those which refused, may afterwards administer, notwithstanding the refusal before the Ordinary; but if all refuse before the Ordinary, and the Ordinary commit the administration to another, then they cannot prove at any time; and the Executor that proveth the Will, ought to name every other of the Executors that refused in every action for recovery of Debts of the Testator, and they may release the debts, duties, &c. and they which refused may have an action by survivor; and after that Executors have administered, and have once taken upon them the charge of the Executorship, they cannot refuse at any time after.

It is holden in 2 R. 3. tit. Testament. 4. that it is but of late times that the Church had the probate of Testaments in this Land; for 'twas given by an act, &c. and in all the Nations it is not so; but in England, and in many places of England; the Stewards in their Courts-Baron, have probates of Testaments in their temporal Courts at this day.

Lynwood, who was Dean of the Arches and Writ in Anno Dom. 1422. did confess the probate of Testaments to belong to the Ordinaries *de consuetudine Angliæ & non de communi jure*, & that in other Realms the Ordinaries have not so; and in another place he affirmeth, that the power of the Bishop in probate of Testaments, is, *per consensum regni & suorum procerum ab antiquo*. And I have seen a Book in Latin, published, 1573. by the Reverend Father Muthew Parker, Arch-Bishop of Canterbury, who was very learned in matters of antiquity, in these words, *Rex Angliæ olim erat concilio-um Ecclesiasticorum præses, vindex temeritatis Romane, propugnator Religionis, nec ullam habebant Episcopi auctoritatem præter eam quam à rege acceptam*

acceptam referebant, testamenta probandi non habebant; administrationis potestatem omique delegare non poterant. It was resolved by Littleton, Newton, and Danby, in 7 E. 4. 14. that if all the Executors refuse before the Ordinary, they may prove the Testament afterwards; but I think this is before the Ordinary hath committed the administration, for afterwards they cannot. The Executors have the Title by their Testament, which is temporal. But to the suing of Actions in the Kings Courts, the Judges will not admit Executors for to sue, except that they shew the Testament proved under the seal of the Ordinary duly, but alwaies the Kings Courts have used to allow the probate of any of the Executors to enable them all to sue actions; but the probate of the Testament doth not give to them any interest or title, either to the things in action, or possession; for they have all their title and interest by the Testament, and not by the Probate.

Power to grant Administration was granted to the Ordinary, by the act of 31 Ed. 3. cap. 11. for before that time, when a man died intestate, the King, who is *Parens Patriæ*, was accustomed by his Ministers to seize his goods, to the intent they might be preserved, and bestowed for the burial of the dead, for payments of his debts, for advancement of his Wife and Children (if he had any) otherwise to his Kindred; as appeareth in *Rot. Claus. de 7 H. 3. in ib. bonis intestatorum capi solebant in manus regis, &c.* And after, this care and trust was committed to the Ordinaries, and it was resolved, *per totam Cur. M. 8. and 9. Eliz. Dyer.* That the Ordinary himself hath not any authority to sell any goods of the intestate, although they be in danger of perishing; neither can he release any debt due unto the intestate, by a statute in 31 Ed. 3. c. 11. the Ordinary shall depure the
next

Lib. 9. *The Earl of Shrewsburies Case.* 339

next and most lawful friends of the dead person intestate to administer his goods : and the statute in *An. 21 H. 8. cap. 5.* is, that the Ordinary shall grant the administration to the Widow of the same person so deceased, or to the next of his Kin, or to both ; as by the discretion of the Ordinary shall be thought good, &c.

Read this latter statute, to whom administrations shall be granted.

The Earl of Shrewsburies Case, 8 Jacobi, fol. 46.

I. **R**ESolved, that the grant of the Stewardship of the Mannors of M. and B. without naming the County in which, &c. is good, as if the K. grants all the Lands of priors, aliens, without naming the County, but the party in pleading must name the County ; and upon *Non concessit* pleaded, it will appear by the evidence, and by circumstances, what Mannor was granted: but if he had demanded Oyer, and demurred, it will be adjudged against him; for it is matter in fact, and the acts of confirmations extend not where the County is omitted, but where the County is mis-named.

2. The grant from a day past is good, and the intent was, that the Earl shall have the fees from that day ; but if that cannot be, it shall be good for the time to come.

3. The Earl had no power to make Deputies, for three offices pass by these Letters Patents severally, whereof this is the middle ; and to the first, power is annexed to make Deputies, but not to the second ; the words are *habendum offic. præd.* (with such a contraction.) To that the Court answered, that this *Habendum* shall have relation to this office; for it is intended, that the Earl shall exercise this

base office by Deputy; for if a Sheriff shall do it, *a fortiori*, an Earl. 2. Admitting that he cannot make a Deputy, this *Non user* is no cause of forfeiture; for true it is, when an office toucheth administration of Justice, *Non user* without request, is cause of forfeiture; but if he be not bound to exercise it without request, otherwise it is as here, he is not bound by the Letters Patents to hold Courts, until he be required: if an Office be private, and not for administration of Justice, *Non user*, without damage or request, is no forfeiture. 4. Resolved, That the Writ and Count were good, although they were *vi & armis*, and the difference is between *Non feasant*, or negligence, and *mis-feasance*, that may be *vi & armis*; therefore if one bring an Action upon the Case, *quare vi & armis* he hindered men from coming to his Fair, which is *causa causans*, whereby he lost his toll, which is *causa causata*, and the point of the Action, this is good. 5. The Office not being meimorable, it is in his Election to have an Action of the Case, or an Affize, otherwise it is of Land. See five Exceptions taken to the Verdict: *Falsa Orthographia, non vitiat concessionem*, and the difference is between Writs and Grants: *Ille numerus & sensus abbreviationum decipiendus est, ut concessio non sit inanis*, and judgment was given for the Earl of R.

Hickmots Case, 8 Jacobi, com. banco, fol. 52.

IN debt upon an Obligation, the Defendant pleads a Release, which is in these words, The Obligee confessed himself to be discharged of all Bonds, &c. and that he will deliver all but one Bond, whereupon the Action is brought, which was made by the Plaintiff and another.

1. Resolv. These words that the Obligee confesseth

seth himself to be discharged of all Bonds, is a release, and amounteth to that, that the Bonds are discharged.

2. The Exception extends to all the premises, and not only to the delivery.

3. The Plaintiff by confessing that the Obligation was made by another, and the Defendant against whom only he brought the Action, had abated his own Writ, and after the Plaintiff was non-sued.

Batens Case, 8 Jac. fol. 53.

A *Quod permittat* to abate a house levied, *ad nocumentum liberi tenementi* I. P. and now of the Plaintiff, and Counts, that the house of the Defendant doth juttie over the house of the Plaintiff, and judgment given for the Plaintiff.

1. Resolved, that the Plaintiff needs not shew how he had the estate of I. P.

2. The Writ is, *ad nocumentum liberi tenementi* I. P. and now of the Plaintiff, and counts to the Nuisance of the Plaintiff only, it is good; for, the levying in the time of I. P. implieth a Nuisance to him, and he must shew a Nuisance to himself to maintain the action.

3. If it appear to the Court, that the Nuisance is to the damage of the Plaintiff, he needs not shew it specially, as if the house of the Defendant hangeth over the house of the Plaintiff, as here; for it appeareth, that the light was stopped, and that the rain descended: *Quod constat clare, non debet verificare*, and the Plaintiff may abate the Nuisance, if he will: and the statute of *Westm. 2. cap. 24.* which giveth the *Quod permittat* against the Alienee of him who levied the Nuisance, extends not to the Alienee of the Alienee.

Poulters Case, fol. 55.

IF one were taken for the death of a man, he was not bailable at the Common Law, without a Writ *de odio & acia*, which serveth not if he be appealed or indicted. 2. If he be found not guilty upon the said Writ, he was not bailable without a Writ *de penendo in ballivum*. 3. A Writ of conspiracy lyeth not before acquittal, but the conspirators may be indicted or censured in the Star-Chamber. Confederacies punishable by Law before Execution, ought to have four incidents.

1. They must be declared by some manner of prosecution, as was in this Case.

2. They ought to be malicious, and for revenge.

3. They ought to be false against an Innocent.

4. They ought to be out of Court voluntarily

Aldreds Case, 8 Jacobi, fol. 57.

WHen a man hath lawful profit by prescription of time, whereof the memory of man is not to the contrary, other custom of the like time also, cannot take the former away; for the one custom is as antient as the other. As if a man have a way over the Lands of B. to his Free-hold Land by prescription of time, B. cannot alledge prescription or custom to stop the said way; for it may be, that before the time of memory, the owner of the said lands had granted such a way, without any stopping; and so the prescription might have a lawful beginning, 29 *Elix. Banco Regis*.

Thomas Brand prescribed time out of memory to have the light of seven windows towards a piece of land of *Thomas Mosely*, in the City of *York*, but
Mosely

Mosely erected a new building upon the said piece of land, so neer, &c. as the light of the Windows were stopped. *Brand* brought his Action on the Case, and Judgment was given for the Plaintiff; for it might be, that before the time of memory, the owner of that piece of land did grant license to the owner of the Messuage, to have the said seven Windows, without stopping them, and so the prescription might have a lawful beginning.

If a man have a water-course to his house for necessary uses; if a Glover make a Lime-pit for Calfskins so neer the said course, that the corruption doth corrupt the same; an Action of the Case lyeth. 13 H. 7. 26. 6. Likewise a man shall not make or erect a Swine-sty so neer his neighbours house, as to annoy him with the contagion thereof.

John Lambes Case, 8 Jacobi, Star-Chamber, fol. 39.

It was resolved, that every one that shall be convicted in case of *Libelling*, ought to be either a contriver of the Libel, or a procurer of the contriver, or a malicious publisher thereof, knowing it to be a Libel: for if one read a Libel, or hear the same read, it is no publication; for, before he hear or read the same, he cannot know the same to be a Libel; or, if he read, or hear the same, and laugh thereat, this is no publication; but if after he had read or heard the same read, he repeat the same, or any part thereof in the hearing of others; or, if he write a Copy thereof, and do not publish the same to others; this is no publication of the Libel, but it is good for him after he hath so written the same, to deliver it to a Magistrate, for then the act subsequent doth declare his intention precedent.

Robert Bradshawes Case, 10 Jacobi, fol. 60.

Lessor for six years during the life of R. covenants that he had power to make this Lease, the Lessee brings Covenant, and sheweth not that R. was in life, nor what person had right, and yet good: because, if R. were not in life at the time of the Lease made, the Lease was absolute if he died after, yet the Action lyeth, and he needs not shew who had right, for he had pursued the words of the Covenant, and it lyeth not properly in his notice.

*Mackallies Case, In killing of a Serjeant, &c.
9 Jac. fol. 65.*

Five Exceptions to the Indictment.

1. The Arrest was in the night, between five and six of the Clock, in November, at the sute of a subject, which being tortious, the killing of the Serjeant is but Man-slaughter. *Non alloc.* 1 Because the Arrest may be at the sute of a subject in the night.

2. Although that between five and six in November be in the night, yet the Court is not bound to take notice of it, without the suing of the party, as in case of Burglary.

3. The Sunday is not *dies juridicus*, therefore the Arrest that was made upon it was *Tortious*. Resolv. That judicial acts shall not be done this day, but ministerial may for necessity.

4. The Indictment is *in computat. in parochia S.M.* in W. omitting the Ward, yet good; as if one name the Town, he is not bound to say in what Hundred it is, 4 and 5 the precept was to arrest him, *infra libertates L.* and the arrest was in L. yet good, because the Liberties of L. includes the City of L. it

Self

self. 1. Exception to the Verdict, that the Indictment and the Verdict vary; for, the Indictment is, that the arrest was by precept, and by Verdict it is found that it was by custom without precept. Answered, that the precept is but circumstance, and variance in that is not material, having found the substance; as if the Indictment be, that he killed him with a Dagger, and it is found that it was with a Sword; so if he be indicted of murder, and it is found man slaughter, this is good; for *ex malitia* is but circumstance. 2. The Indictment may be general, *ex malitia, &c.* because the Law implieth malice, and so the Precept not material. 3. The custom is not good, to arrest one without summons: it is good, and if the process be erroneous, yet killing of him who did execute it, is murder, because he is not to dispute whether it be good or not, and if any officer in doing his office be slain, this is murder, and in such a case an officer is not bound to flye to the Wall, as another is. 4. The Arrest cannot be before the plaint entred of Record before the Sheriff. *Resp.* It may by the custom after entry of it into the Porters Book.

4. The Serjeant ought to shew at whose sute the Arrest is, and in what Court, and for what cause; true it is, if the party submit himself; but here he was killed before he could speak; and if they kill him before the Arrest, knowing that he came for that purpose, this is murder.

5. It is not found that the killing was felony *Resp.* It is sufficient for the Jurors, to find the killing; which is the substance, and leave it to the judgment of the Court, if it be felony.

6. The Serjeant did not shew his Mace: He ought not.

1. Because he was commonly known.

2. The party arrested is to obey at his peril, and
if

if shewing of the Mace be requisite, it will be a warning to the party to file.

7. The arrest thought to be upon request after the plaint entered : the request may be before or after.

8. The verdict is repugnant, for they find that the plaint was entered of record 17 Nov. and after they found that it was 19 Nov. this is more strong against the Prisoners, because the entry was before the Arrest 18 Nov.

9. The Plaint is without form; this is not to the purpose, for it is but a remembrance to draw the count by at large after. And *Mackalley* and the other Prisoners were executed at *Tyborne*.

Peacocks Case, 9 Jacobi, in Camera Stellata, fol. 70.

SIR George Reynell Plaintiff, Richard Peacock, and Others, Defendants, J. H. J. B. Commissioners to examine Peacock upon Inter, and Peacock being examined, would have declared all the truth; but J. H. a Commissioner for the Plaintiff, held him strictly to the Inter. so as the truth could not appear : and this was holden by the Lord Chancellour, and the two Chief Justices, the Chief Baron, and all the Court of Star-Chamber, a great misdemeanour, &c. as the statute of *Exceter* saith, *ver quod justitia & veritas suffocantur*, and Commissioners to examine, ought to be indifferent, and by all means to express the truth. And they are not bound strictly to the Letter of the Inter. but to every thing also that ariseth necessarily for manifestation of the truth. And the said J. H. when he was in Examination of Peacock, went forth of the place to the Plaintiff, being in another Room, and had secret conference with him : And it was holden by all the Court, that a Commissioner, before publication of the dispositions, ought

ought not to discover to any of the parties the matter thereof, nor after that he beginneth to examine Inter. to conferr with the parties, to take new Instructions to examine further than he knew before: and if he did, they were great misdemeanours, and punishable by Fine and Imprisonment; for if such things should be suffered, perjury would abound. J. H. was put forth of the Commission of the Peace, and the Attorney general was required to prefer an Information against him, for the said misdemeanours.

Doctor Husseys Case, 9 Jacobi, fol. 71.

IN ravishment of ward against a Feme-Covert, and others, they were found guilty, and the Baron *Non culp.* and the Age of the Infant above sixteen, and married: *Foster and Warberton*, a Feme-Covert is within the statute, because the Action lay at the common Law, and the statute gives, but greater punishment, and so she is within the statute of *Merton*, cap. 6. *de malefactoribus in parvis*, of forcible entry, and re-disseisin. *Cook and Wamsley* to the contrary: the statute of *Westm.* 2. cap. 35. hath made these alterations; this extends to Heirs Females, which the statute of *Merton* did not. 2. It extends to Heirs ravished after years of consent; so doth not the statute of *Merton*. 3. It extends to the Clergy; the statute of *M.* doth not. 4. *M.* giveth a right of Ward; this giveth ravishment of Ward. 5. This giveth more speedy process, and the death of the Plaintiff or Defendant abateth not the Writ. 6. It giveth greater punishment. 7. A Feme-Covert is not within this statute, for it is *sibi redem maritaverit, & satisfacere non potuerit, abjuret regnum*, or be perpetually imprisoned; and because the Law disableth the Feme to satisfie, she shall not therefore be exiled,

led, not perpetually imprisoned, and the Baron being innocent, shall not be punished; for the punishment is personal, and he shall not have judgment at the Common Law, the Action being brought upon the statute; nor judgment upon the statute where the Action is brought at the Common Law.

3. The Verdict is insufficient, because no Case is within the statute, except the Ravisher marry the Infant, so that if the Infant marry himself, or be married by another, it is out of the statute, and the Verdict found that he was married, and did not say by whom. 4. Damages shall be recovered upon this statute; and where the statute saith, that he shall be banished, or perpetually imprisoned, the Election is in the Court.

Combes Case, 9 Jac. fol. 75. upon a special Verdict.

A Copy-holder in fee (where there is no custom to that purpose) maketh two his Attorneys, to surrender to the use of I. N. in fee, they in Court shew the Letter of Attorney, and by the said Letter of Attorney surrender.

1. Resolved: Surrender by Letter of Attorney is good, for a surrender may be by the Common Law without custom, and may be by Attorney as incident to it: If one have a bare authority, coupled with a Confidence, he cannot do it by Attorney, as Executors cannot sell by Attorney; but if he had authority to dispose, as owner of the Land, he may, as *Cestuy que use* by the statute of 1 R. 3. but if one had particular personal power to dispose, as owner of the Land, he cannot do it by Attorney, as if Lessee for life had power to make Leases for 21 years. There are personal things which cannot be done by Attorney, as Homage, Fealty, beating his Villein:

Villein : admittance of him to whose use the surrender is made, may be by Arturney, if the Lord will; and yet he may, upon the admittance, compel the Tenant to do fealty, *à fortiori* here : and otherwise it would be a mischief ; for it may be he is beyond the Sea, or sick, and cannot be present, to surrender for payment of his debts, or preferment of his Children ; but if a custom be, that an Infant may make a feoffment at 15 years, he cannot do it by Attorney.

2. The Attorneys have pursued their authority, although they have not done it in the name of the Authorizer ; for they did shew the Letter of Attorney, and surrendered by authority thereof, which is all one ; but if it be to make a Lease by Indenture, this shall be in the name of him who gave the authority. but Executors must sell Land in their own name, for necessity, and yet the Vendee is in by the Devisor.

Henry Peytoes Case, 9 Jac. com. banco, fo. 77.

IT was resolved, *per tot. curiam*, that accord in all Actions, wherein is supposed the Tort to be made (*vi & armis*) where *cap.* and the Exigent lyeth at the Common Law, is a good plea, as in Trespass, and *Ejectione firme*, detinue of Charters, house, or other goods ; for where the certainty is to be recovered, an Action is a good plea, when the condition in a Deed by the Original contracts of the parties, is to pay mony, yet by accord and agreement between the parties, any other thing may be given in satisfaction of the mony, *Res per pecuniam estimatur, & non pecunia per rem*. And in this sense the saying is true, *Quod pecunie obediunt omnia*.

Every

Every Accord ought to be plain, perfect, and compleat; for if divers things are to be observed and performed by the Accord, the performance of part is not sufficient, 17 E. 4. 2. & 8 H. 7. 10. *Pl. com.* 5.

If a man be bound in an obligation, in one hundred Quarters of Wheat, upon condition to pay 58 Quarters; he cannot give money or other thing in satisfaction thereof, because the contract originally was not for money, but for a collateral thing.

Also if the things to be performed be at a day to come, tender and refusal is not sufficient without actual satisfaction and acceptance.

If a man be bound in a Statute, Recognizance, or Obligation, and after a defeasance is made to pay a less sum; now this sum in the defeasance is collateral; and therefore if the Obligor tender the same at the day, and it is refused, the Obligee shall lose the same for ever; as is holden in 33 H. 6. *fol. 2.* and yet in this case, the Obligor by Accord between the parties, may give an horse for other thing in satisfaction of the money in the defeasance; for the Contract originally was for money. But if a man by Contract or Assumpsit without Deed, be to deliver an horse, or to build an house, or to do any collateral thing, money may be paid by Accord, in satisfaction of such Contract; for as a Contract in consideration may commence by word, so by accord, by words for any valuable consideration, the same may be dissolved.

Agnes Gores Case, 9 Jacobi, fol. 81.

WHerein was resolved, that if A. put poison into a pot, to the intent to poison B. and set the same in a place where she supposeth B. will come, and drink thereof; and by accident one C. unto whom A. had no malice, cometh, and of his own will, taketh the pot, and drinketh thereof, of which poison he dyeth; this is murder in A. for the Law coupleth the event with the intention, and the end with the cause. But if one prepare Rats-bane to kill Rats or Mice, and lay the same in certain hidden places to this purpose, and with no ill intent, and another person finding the same, doth eat thereof, and dyeth, this is no Felony; but when one prepareth poison, with a felonious intent to kill any reasonable Creature, whatsoever reasonable Creature is killed thereby, he that had the felonious intent shall be punished. Resolved by all the Justices of England.

Coneys Case, 9 Jacobi, fol. 84. in banco.

THe Lord of a Mannor, and Tenant within the age of 21 years by Fealty and Rent, the Lord infeoffeth a stranger, to which feoffment [the Tenant] attourneth. Question, Whether the attornment of an Infant will bind him to the payment of the services or nor, and by *Cook, Walmsley, Warberton, and Foster*, it shall bind, for he is compellable in a *per que servitia*, and shall not have his age, but he may avoid any prejudice thereby at his full age; and if a fine here had been levied, he had been compellable: and the rather, because it is but a bare assent.

Pinchons

Pinchons Case, 9 Jacobi, fol. 86.

IT was adjudged, that an Action of the Case, will lye against Executors, for a debt due by the Testator upon a simple contract. An action upon Assumpsit, made by the Testator, was maintainable, against the Executors, upon a contract for Corn, *Nowood and Reads Case, Plow. com. 181.*

Debts upon simple contracts ought to be paid before legacies, and reasonable part of the goods of the Wife or Infant, which proveth that they still remain; the Spiritual Court doth give remedy for payment of legacies; and the reason of all this is, for that the Testator in his life time, upon his action of the Case upon the *Assumpsit*, might not wage his Law, as he might have done upon his action of debt; for no action is maintainable against executors, where the Testator might have waged his Law in his life time: If a Prisoner do eat and drink with his Gaoler, and dye, the Gaoler shall have an action of debt against his Executors, for the meat and drink of the Testator; and the reason is, for that in this Case the Testator might not wage his Law, as is adjudged, 27 H. 6. fol. 46. in *Thomas Bodulgates Case*: and the reason that no wager of Law in this Case is, because that every Gaoler ought to keep his Prisoner *in salva & arbitria custodia*, and thereby the Gaoler is in a manner compelled to find Victuals for his Prisoners, and therefore the Prisoner may not wage his Law; but if A. contract with B. for his commons for a month, &c. there, in an action of debt brought against A. he may wage Law.

If a Victualler, or common Inn-keeper bring an action of debt for victuals delivered to his Guest, the Guest may wage his Law; for the Victualler, or Host, is

is not compellable to deliver Victuals, until he be paid for them in hand, 10 H. 7, 8. in *Anno* 4 H. 6. R. G. brought an Action of Debt for ten Marks against *Thomas Timberbull*, and others; Executors of *William Webb*, and declared, that the Testator had de-
rain'd the Plaintiff to be with him for a year in the Art of Limming of Books; paying *per annum*, ten Marks: And *Martin* did hold opinion, that the action was not maintainable against Executors; and he took diversity between this Case of a Limmer, and of a common Labourer; for the Labourer may be compelled in spight of his head to serve, and his wages is put in certainty by the statute; and it is no reason the Servant should lose his wages by the death of his Master, whom he was bound by the Law to serve; but in case of a Limmer, he is not bound by the Law to serve; and so when he makes a Covenant, it is his own act and folly, and not the act of the Law; for he might have taken a specialty, and the opinion of *Martin* in this case, is good Law: But the true reason of this diversity, is, because that in this case of the common Labourer, the Testator might not wage his Law, as he might against a Limmer; and this appeareth in 11 H. 6. fol. 43. where the Gardian of *Freres Minors* in *Coventry*, brought an action of Debt against *John Burton* of *Coventry*, Executor of *John Goat*, and declared that the said *John Goat* retained at *Coventry* *Frere John Bredon*, a Brother of the said House by Licence of the said Gardian to sing for him Masses for one whole year; and to say Saint *Gregories* Trentals in the next year after, and shewed in certainty, upon what services Saint *Gregories* Trentals did consist, taking for this, x l s. *per annum*; and within four daies *John Goat* dyed, and the Defendant his Executor, and the said *John Burton* granted to the said *Frere*, to pay him the said summ, for
A a doing

doing the said services according to the Reteinor of the Testator, which divine services the *Frere* did perform according to the Reteinor, and all his wages were Arr. And in this case the diversity was taken, that a labourer may have an action of debt against Executors without specialty, because that he may be compelled to serve by the statute, and the Testator shall not wage his Law in this Case. But the Priest or *Frere* is not bound to sing Masses, by the Law, against will. And in every case where the Testator might have waged his Law, the action is not maintainable against his executors without specialty; for executors may not wage the Law upon the contract of another, In 2 H. 4. f. 16 *Lawr.* Saint Martin retained one for term of his life, in the time of peace and warr, 100 s. per annum, which service he (as his servant) did do for two years, for which he brought his action of debt against *John Belton*, and others, Executors of the said *Lawr.* And judgment was given against the Plaintiff, for the reason, and upon the same diversity, as is aforesaid; an *Assumpsit* without specialty is no more personal than a Covenant by specialty, and therefore dyeth not with the person.

William Banes Case, in Banc. Reg. 9 Jac. fol. 93.

VPon an action of *Assumpsit* against Executors, the Plaintiff needeth not to averr, that the Executors have assers in their hands of the goods of the Testator, to the value of the said debt; for it shall be intended *prima facie*, that they have Assers; for the Law doth presume, that the Testator will not leave a greater charge upon his Executors, then he will leave benefit to discharge.

If a stranger do say unto a man to whom a debt is owing, I pray you forbear your debt, and do not sue
the

the Party until Michaelmas, &c. and then I will pay you the debt. This is a good consideration, although it be no benefit to him that made the promise for it : It is a damage to the Creditor to forbear his sure or debt; he may have his action of *Assumpsit* against such a stranger after the day.

Sir George Reynels Case, 9 Jacobi, fol. 95.
In Chancery.

I was found by office, by Commission under the great Seal, that the Marshal of the Kings Bench had committed divers forfeitures of his Office, by suffering voluntary escapes of Prisoners : That Office, and such like, may not be granted for years, because it is an office of trust, and personal, and he must continually attend, and be sworn in Court.

Two matters of Record amount to an office; as in the Case of Sir John Savage, who was Sheriff of the County of Worcester for life, by Letters Patents under the great Seal, and was indicted of two voluntary escapes of Felons : and the King may seize his Office into his own hands, without suing forth any *Scire facias*, 9. Mar. Dyer. The Abbot of Saint Albanes, had a Gaol, and detained prisoners therein; and because he would not be at charges to sue forth Commission for the Gaol-delivery, the King caused his Franchise and liberty thereof to be seized into his own hands.

The Abbot of Crowland had a Gaol and Prisoners, and for that he once detained men that were quit of Felony, the King re-seized the Gaol for ever.

If a man grant an Office to another for life, or for years, and he will not do his Office, or otherwise mis-use his Office, the Grantor may re-seize the said Office 39 H. 6. fol. 34.

If a Gaoler commit voluntary escapes, or permit them, this is a forfeiture of his office, *Cooke, Lib. 9.* in the County of *Salops Case.*

The King may grant the custody of the Gaol to one in fee, and also to the Sheriff of a County, to one, and his heirs, which estate in fee simple, includes all other estates; and it is true, that these grants may be made by Law; for in these cases there is not any intermission; for presently after the death of the Ancestor, the Office descends to the heir.

2. This Office cannot be forfeited by Outlary, as if it were granted for years, it might; grants of these Offices in fee, or for life, have been allowed, and approved; but such grants for years were never allowed or approved, *Et periculosum existimo quod bonorum virorum non comprobatur exemplo*: he that hath the custody of the Gaol, whether by right or wrong, shall be charged with escapes of Prisoners, until he be actually removed.

Margaret Podgers Case, 10 Jacobi, fol. 104.

I. P. Copy-holder for life, the remainder for life, the Lord bargained and sold, and levied a fine to I. P. this descended to M. P. who levied a fine, five years past without claim of them in remainder, adjudged no barr.

1. Resolved: That Copy-hold estates are within
4 H. 7. by the word *Interest* but if the word be by co-
vin, this barreth not the issue, if Lessee for years, or
Copy holder be ousted, the Lord shall not have five
years after a fine levied by the disseisor, after their
estate determined, because he may presently have an
assize; otherwise where Lessor for life is ousted: A
meer stranger cannot enter to avoid a fine with-
out Commandement, or assent of the party who hath
right,

right, but a Gardian in socage, or Lessor for life, or Lord of a Copy-holder, may, for the privity between them, and the Infant or Lessees.

2. A fine barreth not any by Non-claim, who is not put to a right; therefore here they in remainder are not barred, because the bargain and sale, and fine to the tenant in possession putteth them not to a right.

1. Because it is lawful act.

2. Tenant in possession devesteth not the remainder by acceptance, as if Lessee for life accept a fine, *come ceo*, although it be a forfeiture.

3. Because he is in by 27 H. 8. of uses which doth no wrong.

4. After the bargain and sale, he in the next remainder shall not enter; for by the custom his estate was to commence after the death of the tenant in possession, so if tenant in possession forfeit, the Lord, and not he in remainder shall enter, but thereby without a special custom the remainder is not destroyed: If a Copy-holder in fee surrenders to the use of one for life, no more passeth than serveth the estate limited, and he shall pay no fine for admittance after the death of tenant for life: It seemed to the Chief Justice, that if the Lord here had charged the land, I. P. shall not hold it charged; for the estates in remainder preserve him from incumbrances of the Lord.

*Meriel Treshams Case, 10 Jac. com. banc.
fol. 108.*

AN Administratrix, Defendant in debt pleads that the Testator and his Son acknowledged a recognizance to the King, of a hundred pound, and another of 800 l. to B. and another of 1000 l. to M. and

M. and divers others, over and above which she had not assets, and after said, she had not sufficient assets, the Plaintiff replieth, that the recognizance to B. was for payment of 400 l. which is paid, and the other to M. is to perform Covenants, whereof none is broken; and the recognizance remaineth in force by covin of the Defendant.

1. Resolv. That the barr is insufficient; for she first confesseth, that she had sufficient assets to pay the said recognizances, and after denieth.

2. She said, she had assets, but not sufficient; this is too general. but she must confess how much she had, because she had knowledge thereof.

3. The pleading by the Plaintiff, that the Obligation was made to perform Covenants, is good without more certainty, because he is a stranger,

4. The general allegation of covin is good, without shewing of refusal to release, &c. and fraud may be in one only; also the bar is insufficient, because the intestate was bound in the recognizances with another, and the Defendant had not averred, that the other had not satisfied them:

Robert Marys Case, 10 Jac. fol. 111.

A Commoner being a Copy-holder, brings an Action upon the Case, for putting Beasts into the Common, whereby he lost his Common; the Jury found that the Defendant did not put in the Beasts, but they of themselves depastured there.

1. The Jury have found the substance of the issue for the Plaintiff, the depasturing there, and it is not material, if he put them not there.

2. This action lyeth, for the Commoner; for he may distrein damage-feasant, and it may be, that with strong hand he is hindered to distrein, and so
if

if he shall not have this action he is remediless.

2. A Commoner, who had free-hold in the Common, shall have an assize; *ergo*, a Copy-holder shall have this action.

3. The wrong ought to be so great, that the Commoner lose his Common; as a Master shall not have an action for beating his Servant, without loss of his service, and it appeareth not to the Court, that there are more Commoners than he; and if there be, yet an action lyeth, because each had private damage, and it is not like to a Common Nuisance, which shall be punishable only in a Leet, if there be no special damage; but be the trespasses never so little, the Lord may have an action of Trespass.

The Lord Sanchers Case, 10 Jacobi, fo. 117.

for procuring the Murther of John Turner, Master of Defence.

1. **R**esolved: That a Baron of Scotland shall be Tried by the Commons of England.

2. The Indictment of the accessory in one County, to a Felony in another County, by the statute of 2 E. 6. c. 24. shall recite, that the felony was done in the other County; for an Indictment is no direct affirmation of the fact.

3. The Justices of the Kings Bench are within these words of the statute, Justices of Gaol-delivery, or Oyer and Terminer; for they are the supreme Judges of Gaol-delivery.

4. The Lord Sancher cannot be in the Term-time arraigned in Midd. before Justices of Oyer and Terminer, because Justices of Oyer and Terminer shall not sit in the same County where the Kings Bench is, but the principals were arraigned in L. in the Term-

time, because this is another County.

5. There needs not be fifteen daies for the return of the *Venire facias*, upon an indictment in the same County where the Kings Bench is, otherwise in another County.

6. Because there is no direct proof that the Lord S. commanded one of the principals, but that he associated himself to one who was commanded; the best way is to arraign him as accessory to him whom he commanded; but if he be indicted as accessory to two, and found accessory to one of them; this is good.

The word Appeal in the statute of *W. 1. c. 14.* is to be intended generally (*viz*) by indictment, by Writ or Bill, &c. and Attainder is to be attended upon any such accusation, *ergo*, if upon any such accusation the principal be attainted erroneously, the accessory may be arraigned, because the attainder is good until it be reversed; but if the accessory be hanged, and after the attainder against the principal is reversed, the heir of the accessory shall be restored to all which his Father lost, either by entry or action; By *5 H. 4. cap. 10.* none shall be imprisoned by Justices of Peace, but in the common Gaol; whereby it appears, that Justices of Peace offend, who commit Felons to the Counters in *L.* and other Prisons, which are not common Gaols.

Cases in the Court of Wards.

Anthony Lowes Case, 7 Jacobi, fol. 112.

A. L. tenant of 59 acres, parcel of the Mannor of A. by Chivalry, and Sute of Court to B. whereof A. was parcel, and both A. and B. were parcel

parcel of the Dutchie of *L.* out of the County Palatine holden formerly of the King in Chivalry in *Capite*, and of another house there, holden of *A.* by fealty, and rent, *H. 8* grants the rent by release to him, and confirmeth his estate of the said lands by fealty only, and grants to him the Mannor of *A. Tenendum* by fealty and rent: It was objected, that when the King grants his Seigniorie to his tenant, the ancient Seigniorie is extinct and a new one that is best for the King created, (*viz.*) Chivalry.

2. When he extinguisheth services parcel of the Mannor of *A.* this shall be holden as the Mannor of *A.* is; this is by Chivalry.

But resolved, that the 59 acres and house, shall be holden by fealty only? and as to the said Objection, the release of the King doth not extinguish service, which is inseparable to a Tenure that is fealty, but all others are gone; and true it is, when the King grants and expresth no Tenure, it shall be by Chivalry; but when the Land moveth from a subject, and the tenure is changed, the new Tenure shall be as neer the ancient as may be, as feoffee of Tenant in *Frankalmourne*, shall hold by fealty only; and here, although they grant the services, yet he limits the grantee to do fealty. A Knights fee is not to be taken according to the quantity, but the value of the land, as 20 *l. per annum*, and a hide of land, is as much as a Plough can plow in a year; Relief is the fourth part of the annual value; that is, of a Knight, five pounds; of a Baron, 100 Marks; of an Earl, 100 *l.* of a Marquess, 200 Marks; of a Duke, 200 *l.* The eldest son of *E. 3.* called the black Prince, was the first Duke in *England*; *Robert*, Earl of *Oxford*, in the Reign of *R. 2.* was the first Marquess; and the Lord *Beaumont* was the first Viscount created by *K. H. 6.*

Floyers Case, 8 Jac. fol. 125.

Baron and Feme seised of lands holden in Chivalry in the right of the Feme in fee, levy a fine to one who grants and renders to them, and the heirs of the Baron, and levy another fine to their use for life, the remainder to their three Sons in tail, one after another; the remainder in fee to the heirs of the Baron; the King shall have neither wardship of body nor land.

1. Resolv. That is out of the statute of 32 H. 8. cap. 2. if he who had the fee dye, &c. in respect the estate by the first fine did not continue; and this, although both the conveyances are voluntary.

2. The King shall not have wardship of the third part, because it is not for advancement of the Wife; for in the first fine the land moved from her, and she had no more by the second fine, than by the first.

3. In regard the particular estate is out of the statute, no wardship accreweth to the King, by advancement of him in the remainder; but if a Reversioner upon an estate for life, convey to the use of his wife, this will give wardship of the body of the heir, for he in reversion is Tenant: if a lease for life be the remainder to two, and to the heirs of one, he who hath the fee dyeth, his heir shall not be in ward: if the heir of one Joynt-tenant, who had the fee, dye of full age (living the Tenant for life) his heir shall not be in ward, although he be within age by that statute, because he is not immediate heir.

Sondayes case, 8 Jac. fol. 127.

M. S. deviseth to his wife for life, the remainder to W. S. and if he shall have issue, that then his issue shall have it, the remainder to S. the remainder to T. &c. *Totidem verbis*, upon condition that if any of them, or the heir of their bodies, go about to alien, that he in the next remainder to enter after the death of M. W. and S. T. suffereth in a common recovery to his own use in fee, he the next remainder enters.

1. Resolved : Every one of the Sons hath an estate tail. 1. These words, if he dye without issue male, are sufficient to create an estate tail. 2. The general clause, If any of his Sons, or Heirs of his body do it maketh it manifest. 3. The condition proveth it, for they cannot alien if they have but for life; for this would be a forfeiture.

2. The restraint of the tenant in tail, to suffer a common recovery, is void : See *Mildmayes Case* in the sixth Book.

Quicks Case, 9 Jacobi, fol. 829.

THe King Lord, I. N. and Tho Q. mesnes of a Mannor which they hold in common in *capite*, and tenant of three Acres holden in Chivalry; T. Q. maketh a feoffment of his moiety to the use of himself for life, the remainder to I. Q. his Son in tail, the tenant infeoffeth I. Q. who infeoffeth T. Q. to defraud I. N. of the Wardship of his Son within age, and dyes, I. N. seiseth the Son, T. Q. dyeth, the King shall not have wardship of the body, and moiety of the three acres.

1. Resolv. By the death of I. Q. it was a Chattel vested

vested in I. N. and the King had but a possibility to have it, if T. Q. die during the minority of the ward, which possibility shall not devest the wardship out of I. N.

2. When the tenant infeofeth a stranger to defraud the Lord of wardship, the Lord shall not have ravishment of ward, before recovery of the land in the right of ward; and although the title of I. N. be but in action, yet it shall not be devested by a descent after: See the statute of 34 H. 8. in case of collusion.

[*Bewleys Case, 9 Jacobi, fol. 130.*

THe King Lord, Mesne by socage, and tenant, the tenant is attainted of Treason, the King grants to one *tenendum* by Chivalry and Rent, and to do his services to other Lords, the tenant shall hold by socage of the Mesne, and he by socage of the King, because the intent of the King was to revive the Mesnalty, which cannot be by any other way; and the reviving of the ancient tenure shall be in construction preferred before the reservation of a new; and the honour of the King shall be preferred before his profit; and there was no default in the Mesne.

Thomas Holts Case, 9 Jacobi, fol. 131.

Grandfather tenant in Chivalry in *Capite*, Father, and Son, the Grandfather conveyeth part of his lands to the use of the Father, and his Wife, the remainder to the Son in tail, &c. the remainder to the right heirs of the Grandfather, and conveys other lands to his younger Children for life, with
divers

divers remainders over, and dyeth, the Father tenders livery, and before he sueth it, dyeth.

1. Resol. By the death of his Father before livery sued, and after tender, the King loseth the primer seisin, but not mean rates, if any be due.

2. The Son shall not pay primer seisin, nor sue livery, because the Father, and not he, was within the statute of 32 H. 8.

3. If the King had had one primer seisin, he shall not have another of the lands conveyed to the younger children, but that ought to be an effectual seisin; ergo, here, because the King had not the effect of the primer seisin of the Father, he shall have primer seisin of the lands conveyed to the younger children, as if he had the grant of a prochein avoidance and presents, and the Clerk dyeth before Induction, he shall present again, and before the statute *de Donis*: If a tenant in tail the reversion to the King had aliened *post prolem suscitata*, with warranty which descends upon the King, it is no barr without assents, the effect of the warranty.

4. The King shall not have primer seisin in regard of a secke reversion, which descends to the Son; otherwise if a rent be reserved, the King may have that for a year: So note, for a fruitless reversion there shall be wardship, but no primer seisin.

Matthew Menes Case, 9 Jacobi, fol. 133.

Tenant of the King of a Messuage in *capite*, who holds other Gravel-kind land, deviseth all to his four Sons equally: 1. Whether the King shall have a third part of a Messuage only. 2. Whether out of the part of the heir only; because the *Prærogativa Regis, cap. 1. Rex habebit, &c. de quocunque tenuerint, &c.* is intended, if the land descend to the same heir

heir to whom the land holden did descend.

1. *Resolv.* If no Will had been made, the King shall not have the lands, holden of others in socage; but when by the Will (to which he is inabled by the statute) he deviseth it to his Sons; here the saying in 32 *H. 8.* giveth to the King ward and primer seisin: So if lands in Chivalty, devisable by custom, are devised to the Feme, although the devisee be good, for all without aid of the statute, yet the King shall have the wardship of a third part.

2. The King shall have his third part out of all their estates equally.

Ascoughs Case, 9 Jacobi, fol. 134.

THE King Lord, Mesne in *Capite*, and tenant in socage; the Mesne grants to the use of himself for life; the remainder to the tenant in tail, if the remainder suspends the Mesnalty during the life of the Mesne.

Resolv. That during his life the Mesnalty is not suspended. 1. Not as to the Mesne, because he remaineth tenant to the Lord, nor by reason of the remainder for the avoiding of fractions; otherwise if the remainder be limited in fee, for then he hath as high an estate in the Mesnalty, as in the Tenancy; and this can never be revived: and otherwise a Seigniorie in fee shall issue out of a Mesnalty for life, and there will be the Lord and tenant in fee, and Mesne for life: but if the Lord grant his Seigniorie for years, the remainder for life to the tenant, the Mesnalty is suspended: a Mesnalty or Seigniorie cannot be suspended in part, and in *esse*, for part by the act of the party, but they may by act of Law, or of a third party: As if the Lord take a lease of part of the tenants, all the Seigniorie is suspended; but

if a Gardian indow the feme, the Seigniory is in *esse*, for that part, and suspended for the residue : If two Coparceners are of a Seigniory, and one cometh to the tenancy by defeasible title, the other shall distrein for the moiety of the Seigniory, and the act of the Coparceners shall not prejudice her.

There are four manner of Avowries.

1. Upon his very tenant.
2. Upon his very tenant by the manner, where the tenant had but a particular estate.
3. Upon his tenant by the manner when the Lord had but a particular estate.
4. Upon the matter in the Land, as within his fee, but the Lord hath liberty to avow according to the Common Law.

Throughgoods Case, 9 Jacobi, fol. 136.

TENANT in fee infeofeth one by Deed indented, and delivereth it upon the land, in the name of seisin; this is good, and hath a double operation at one instant, *viz* to deliver the writings as a Deed, and to deliver seisin of the land according to the Deed.

1. *Resolv.* This is his Deed, although he doth not lay so, but delivers it in the name of seisin; for delivery is good without any word : If one deliver a Deed to one as an escrow, to be his Deed upon performance of condition, this is his Deed presently, otherwise if he deliver it to a stranger : so words are good without actual delivery; as if he saith, take it like to a livery within view. If the Obligee deliver the Obligation to the Obligor, to deliver; the Obligor may retain it, for the words to re-deliver are void.

2. Delivery of the Deed upon the land, amounteth

eth not to livery and seisin, but it doth, if delivered in the name of seisin, so of any other thing; or if he saith, I deliver you seisin, without delivering any thing; this is good also.

Beaumonts Case, 10 Jacobi, fol. 138.

I. B. and E. his Wife, tenants in special tail, the remainder to the heirs of the Baron, I. B. levies a fine to K. E. 6. who grants to the Earl of H. in fee. I. B. dyeth, E. enters, the Earl of H. confirms her estate, to have to her, and the heirs of the body of I. B. E. dyeth seised, having issue F. B. who accepts a fine, *Sur consens de droit tantum*, with Proclamations, and dies; having issue, Sir H. and I. Sir H. in ward to the King after full age, and before livery, covenanteth to stand seised to the use of himself, and his heirs, males of his body and dyes, having issue only a daughter in ward, whether she or I. B. shall have the land, &c.

1. Resolv. That E. had an estate tail, and the statute of 8 H 7. c. 24, which enableth the Baron to barr the issue, saveth the right of the Feme, if she enter, or, &c. and one may have an estate tail, which cannot descend, as if the Son in the life of the Father levyeth a fine, the Father remaineth tenant in tail still, although it cannot descend, and E. here hath an estate tail so long as she liveth, or the heirs in tail remain.

2. The confirmation is void, for he who did confirm, had but a possibility, which passeth not by the confirmation, and if he had a reversion in fee, yet it should be void.

1. Because the tail which the feme had was confirmed, which cannot descend.

2. The confirmation doth not add a descendible quality

quality, where he who should have it is disabled to receive by descent.

3. This would in effect repeal 4 H. 7. & 32 H. 8. two of the principal Pillars of the Law.

4 & 5. If Tenant in Dower grants her estate, there is a descendible quality in the heir, to bring waste against Tenant in Dower; and although the heir confirm her estate for life, and after she assigneth it to I. S. who committeth waste, yet the action of waste is maintainable against her, *Pari ratione*; in the Case at Barr, in regard the confirmation doth not enlarge the estate of E. it cannot add unto it a descendible quality.

6. There are but three manner of Confirmations, *Viz* *Perficiens*, *Crescens*, *aut Diminuens*, and the Confirmation in this Case, is none of them: and if E. had no power to levy a fine, or suffer recovery, the reason is, because she cannot barr that which was barred before by her Husband, but this point was not now in Question.

The End of the Ninth Book.

1991

THE UNIVERSITY OF CHICAGO



THE TENTH BOOK.

The Case of Suttons Hospital, Baxter Plaintiff, Sutton and Law Defendants, in Trespasse, in the Kings Bench, and adjourned into the Exchequer Chamber; and judgement given against the Plaintiff.

1. Object.



Y the Parliament 7 Jac. the Hospital was founded at H. in Essex, Ergo, the incorporation made after by the Kings Letters Patents, is void, and the Charterhouse is not given by the said Statute, because S. purchased it after.

2. Sutton who had licence to found an Hospital, before the foundation dyed.

3. The King cannot name the House and Lands of S. to be an Hospital, because in *Alieno solo*.

4. Every Corporation ought to have a place certain, but here the License is to found an Hospital at, or in, the Charterhouse, Ergo, before that S. had made it certain, there was no incorporation; also the place of Corporation ought to be certain by

Metes and Bounds, and a place known will not serve.

5. The King intended to make an incorporation presently, which cannot be before that S. name a Master.

6. Governours cannot be, until there be poor in the Hospital. *Ergo*, S. calleth it in his Will, his intended Hospital.

7. The Foundation cannot be without the words, *Fundo, Erigo, &c.* and before such Foundation, a Stranger cannot give Lands unto it.

8. The Master was named at will, where he ought to be for life, and have freehold in the Land; also the Hospital must be Founded before a Master be named.

9. The bargain and sale made by S. is void.

1. Because the money paid by the Governours in their private capacity, shall not inure to them in their politick capacity.

2. The *Habendum* is to them upon trust, which cannot be in a Corporation

3. Because, as before, no Hospital was Founded.

10. The King cannot make Governours of a thing not in *Esse*.

To the first it was answered, that the Letters Patents recite the preamble of the Act, whereby, and in many parts of the Act, it appeareth that the incorporation was to be *in futuro*, when it shall be erected, and the Statute doth not give any Lands unto it, but power to give without licence of aliénation and mortmain, and it appeareth by the Letters Patents, that the erection precedes the licence.

The License is to him, his Heirs, Executors, &c. at any time hereafter, and the words of Incorporation are in the present, and so the incorporation precedeth the execution of this License,

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3. Although the King gave the name, yet S. devised it, and assented to it, and the K. did it at his Sute.

4. The K makes an Hospital of all the premises, so that it is certain, and as to that which was said, that a place uncertain cannot be an Hospital; It was answered, that a Mannor may be, which is more uncertain than the *Charterhouse*. To the essence of a Corporation five things are requisite. 1. Lawful authority to incorporate; and that may be four wayes, by the common Law as the King himself, by authority of Parliament, by the K. Charter, and by prescription. 2. The persons either natural or political. 3. A name by which, &c. 4. A place. 5. Words sufficient, but not restrained to a strict forme.

5. A Corporation may be without head, as if the K. incorporate a Town, and give to them power to choose a Maior, they are a Corporation before Election.

6. It is a sufficient incorporation, that there be an Hospital *potestate*, for the Temple was a Corporation in the time of H. 1. and yet was not built till H. 2. time; but here the House was built before.

7. The first Donor is in Law the Founder, and when the K. giveth a name, and designs the place and the persons, the Founder hath nothing to doe, but the donation; but if the K. leaveth the nomination to the party, there many times, although not of necessity he useth the words, *Fundo, Erigo, &c.* But in truth the incorporation is made by the K. Charter, and the Founder is but an Instrument.

8. The Master may be at will; for by the Letters Patents S. had power to name one at his will and pleasure.

9. The money paid by some of the Governours in

heir private Capacity is good, but the payment was as Governours, and so they are acquitted. 2. A rent was reserved, which is a good consideration. 3. A bargain and sale may be upon confidence and trust.

10. They may plead that they are seised *in jure incorporationis*, although then It be not *in esse*. In answer to the presidents, some are Explanatory, some Nugatory, *ex consuetudine Clericorum*.

Sir Thomas Fleming Chief Iustice of *England* became sick, whereof he after dyed, so that he never argued the Case: See there is several advancements and commendations.

Mary Portingtons Case, 11 Jacobi, fol. 35.

AFTER many things said concerning Perpetuities, in this case it was said, that a recovery in a value barreth an estate tayl, although no recompence be had; because it is by Iudgement: as if issue in tail be barred in a formedon, by warranty and assents, but if the issue before judgement given, alien the assents, his issue shall recover the land in tail, if tenant in tail suffer a recovery, and dye before Execution, issue is barred. It is absurd that one may barr one of going about to suffer a recovery, when he cannot barr the recovery it self; but if such a condition had been good, Feme-Covert by that shall not lose her Land, for she shall not lose her Land, by any conclusion without examination upon Writ in Court, and if she acknowledge a recognizance, this is void, although it be with her Husband, because there is no Writ to examine her; if an Infant levy a fine, this is voidable, and shall be tryed by inspection, but a fine levied by a Feme Covert is void, if the Husband enter, otherwise not.

Jennings

Jennings Case, 38 Eliz. Banco Regis, fol. 43.

Tenant for life suffers a common recovery, in which he in remainder in tail is vouched, who dyeth, the reversion in fee is barred.

1. Resolved, that at the common Law a recovery against Tenant for life, upon a true warranty, and recovery in value binds him in the remainder.

2. No Statute was made to provide for him, who had a reversion or remainder upon an estate tail, and the Statute of *W. 2. c. 3.* which giveth receipt to a reversioner upon default of him who holds *per donum*, is to be intended of Tenant after possibility of issue extinct; and *32 H. 8. c. 31.* provides only for a reversion or remainder upon a Lease for life.

3. There have been divers evasions out of the Statutes of *32 H. 8.* as if Lessee for life Lease for years to one who infeoffeth one, who in recovery vouches Lessee for life; this was out of the statute, because the Lessor and Lessee were put to a right, whereupon *14 Eliz. c. 8.* was made.

4. *14 Eliz.* extends not where Lessee for life vouched him in remainder in tail, because it is in the power of him in remainder to dock the reversion, &c. and the course is, that Tenant in tail bargains and sells to one who suffers a recovery, in which, Tenant in tail is vouched, and yet the bargainee had but for life: Judgement affirmed in Error.

Lampets Case, 10 Jacobi, fol. 46.

Lessee for 5000 yeares deviseth for life to one whom he makes Executor, the remainder to one Sister, and the heirs of her body, and dyes, the Sister taketh Husband, they release to the Executor,

B b 4

who

who demiseth for ten years to the Defendant, the Baron dyes, the Executor dyes, the Feme takes another Baron, who demiseth to the Plaintiff: judgement against the Plaintiff.

1. Resolved, A devise of the use of a term to one for life, the remainder to another for life, is good, as an Executory devise.

2. A devise of the term it self in such manner is good.

3. The first Devisee cannot barr him who had the Executory devise.

4. Assent of the Executor to the first devisee, is an assent for all.

5. If such a devise be made to the Executor, and he enter, generally he shall have it as Executor.

6. Such an Executory devise cannot be granted over.

7. Such an Executory devise may be extinguished by release to the first devisee.

Object. That the first devisee had all the interest in him, and the other but a possibility, which cannot be released, as if Conusee of a statute release his right in the Land, yet he may sue execution.

It was answered, that a thing in action cannot be granted to a Stranger, neither by the Act of the Party, nor of Law, but it may be released to the Tenant, and here to him who had the present interest.

1. Because as it may be easily created, being a Chattell, so it may be easily determined. 2. Every right as well present as future, by joyning all who have interest one way or other may be extinguish'd; so if the Executor and the Sister here, had joyned in an assignment, this had been good. 3. When many things are requisite to the perfection of any thing, the Law respects the Original Act, and here the fundamental Acts were the devise, death of the deviser, the

the assent of the *Executor*, and death of the first devisee, and she hath a right that may be released, and the death of the *Executor* is but a mean to bring it into possession ; as a Feme Covert barreth her self of Dower by joyning in a Fine with her Husband , but if the Baron sole levy a fine, and dyeth, and five years pass, the Feme is not bound ; so if tenant in ancient demesne levy a fine, he had possibility to have the land again , if the Lord bring a Writ of deceit ; but he may release that possibility, but such a possibility as may be released, ought to be *Propinqua*, and not *Remota*, and it is more than a common possibility, that an *Executor* will dye before 5000 years, and the person who releaseth it ought to have it in certain , therefore if a remainder be limited to the right heirs of J. S. his eldest sonne cannot release it , because he is not certain whether he shall be heir at the death of his Father ; so if a lease be made to Baron and Feme, the remainder to the survivor of them for 21 years, the Baron cannot grant this term. 4. This by her death goeth to her *Executor*, therefore it may be extinguished by her, if the disseisee release all actions to the disseisor, who dyes, the disseisee shall have a Writ of entry against his Heir ; or if Bailor release all Actions to the Bailee, he shall have a detinue against his *Executors*. 5. It is a present Legacy, although the interest be *in futuro* ; and therefore the Legacy may be discharged, and consequently the interest it self , For, *Qui destruit medium, destruit finem*, and this may be before assent of the *Executor*. 6. Otherwise there would be a perpetuity of Chattels.

2. By this release the *Executor* had a perfect estate for 5000 years absolutely.

3. The request and acceptance of the release by the *Executor* amounteth to an agreement.

The

*The Case of the Chancellour, Masters, and Scholars
of the University of Oxford, 11 Jacobi, fol. 53.*

THe statute of 2 Jacobi, giveth presentments of Churches, which belong to Recusants convicted, to the Chancellour and Scholars of O. and makes grants of such Recusants void: One indicted of recusancy, grants a prochein avoidance, & is after convicted, the Church becometh void, the Chancellour, Masters and Scholars, bring a *Quare impedit*, and averr that he remained a Recusant.

1. *Resol.* The grant of the next avoidance betwixt the Indictment and conviction, is void, for the statute is, that a Recusant convicted shall be disabled, &c. from the time of the Session of Parliament; so a grant of the next avoidance by an Abbot before surrender, and after the statute of 31 H. 8. cap. 13. of Monasteries, is void; so if an Officer of the King purchase Land, and alien it, and become indebted to the King, this Land is lyable to the debt.

2. Covine shall not be presumed if it be not averred, and if the Jury find that Covine was to one intent, that shall not be taken to another intent, therefore because it is not said, that this grant was by Covine, it shall not be intended.

3. Although the statute giveth the avoidances to the Chancellour, and Scholars of O. yet they may bring a *Quare Impedit*, in the name of their Corporation, and the misnaming of the Corporation doth not avoid the act when it appeareth what Corporation is intended.

2. It was pleaded, that the statute giveth it to the Chancellour, Masters, and Scholars, and the Defendant had demurred upon it.

3. This being a private act, it shall be taken as it is pleaded.

4. The

4. The University must shew that the Grantor was a Recusant, convicted at the time of the avoidance, but not that he continued so, because it is a Chattel vested in them, which shall not be divested by his conformity after : Iudgement for the Plaintiff.

The Bishop of Salisburie's Case, 11 Jacobi, fol. 58.

THE Defendant in a second deliverance, pleads a grant of the Bishop of S. to E. G. and himself of the Office of surveyorship of his Mannors, with a rent charge of twenty Nobles *per annum*, with confirmation of the Dean and Chapter, and that it is *Antiquum officium*, used to be granted in such manner to such person and persons, as the Bishop and his predecessors shall please : The Plaintiff pleads the statute of 1 Eliz. and that the said Office hath not been used to be granted, but for the life of one, whereby the grant is void, *Et hoc paratus est verificare* : It was excepted to the Barr, that the Avowant had pleaded that the Bishop and his predecessors have used to grant the said Office to such person or persons, &c. and the Plaintiff pleads in Barre, that it had not been used to be granted, but for one life, and concludeth, *Et hoc paratus est*, &c, where it ought to have been, *quod inquiratur per*, &c. yet it is good, because the avowry is in the disjunctive.

2. It is not averred that the Bishop is dead, and if he be not, the grant is good; during his life, it is good, for it appeareth by the words *nuper Episcopum*, that he was dead, or remov'd, exceptions to the avowry, that to say this is an ancient Office is too general, because he made title to the Office it self; but it had been good if he had claimed another thing, by reason of the office; and the exception holden good : It was objected, that this grant was out of the statute
of

of 1 *Eliz.* because no parcel of the possession of the Bishoprick, as the statute speaketh.

2. Such things are restrained by the statute, where- of a rent may be reserved,

3. If it had been an office, parcel of the Bishoprick which the Bishop might exercise, this had been within the statute; but this is not so.

4. If it be restrained for two lives, then also for for one life: But it was resolved, that the said grant for two lives was void against the Successor by the statute of 1 *Eliz.*

1. *Resolv.* This grant had been good at the Common Law, by confirmation of the Dean and Chapter.

2. The Act of 32 *H.8. cap. 28.* enableth the Bishop to make a lease for 21 yeares, or three lives, observing the limitations of the statute, without the Dean and Chapter.

3. The statute of 1 *Eliz.* restraineth the Bishop to grant any parcel of his possessions, or any thing belonging to his bishoprick, but for 21 yeares, or three lives: &c. but against the Bishop himself it is good, and this Office may be said belonging to his bishoprick, because he had an inheritance in the disposition of it, and the intent of the statute was to avoid diminutions and dilapidations, therefore a grant of such an ancient Office of service and necessity for one life, as was accustomed, is out of the statute; but more than that he cannot do, because it is not of necessity; and the death of one of them in the life of the Bishop is not to the purpose; for the grant was void against the Successor, and it shall not be made good by accident after.

4. Such a grant for one life, without confirmation of the Dean and Chapter, is void, because it is out of the statute of 1 *Eliz.* and resolved also, that although

though the bishoprick be new, yet a grant of a necessary Office, with a reasonable fee (of which the Court shall judge) bindeth the successor.

Nota, Where there was a clause in 1 *Eliz.* that Bishops may grant to the Queen, &c. 1 *Jacobi*, by Parliament restraineth them, and after judgement was given for the Plaintiff.

Whistlers Case, 10 Jacobi, fol. 62. Upon a Special Verdict.

BEfore the Statute of *Prærogativa Regis, cap. 15* by the grant of the King of a Mannor, all appendants (without naming them) pass, and the statute excepteth Knights Fees, Advowsons, and Indowments, but all other appendants now pass without naming them: and so do Advowsons pass in case of restitution, for the statute speaketh of Grants, and in Grants also, without expresse mention by the words *Ad eam plenè & integre*, &c. See other good matter there, touching this Subject.

The Church-Wardens Case of St. Saviours in South-wark, fol. 66.

Queen *Elizabeth* leased the rectory to the Church-Wardens of St. S. for 21 years, and after leased to them for 50 years, in consideration of the payment of 20 pound, and surrender of the Letters Patents by the Church-Wardens, *Modo habentes, & ad præsens possidentes*; and the special Verdict found, that they paid the 20 l. and that they delivered the Charter in Court to be cancell'd, and that they paid the Fees, but that no Vicar was made, yet the grant is good; for it appears that the intent was not to make a surrender in deed, because he saith, *Modo possidentes*, but

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a surrender in Law by acceptance of the second Letters Patents; and although a Corporation cannot make a surrender in deed, yet they may make a surrender in Law.

2. Although an action surrender is requisite, they have done all which belongs to them, by delivery of the Charter and payment of the fees, and the Cancelling belongs to the Court.

3. Although it was recited that 20 l. was paid, yet it needs not to be found, for it is but in the personality, and is affirmed by the King to be paid, and is also executed: see *Barwick's Case*, 5 Report. 93.

The Case of the Marshalsea, 10 Jac. fol. 68. In false imprisonment.

AN action upon the Case, upon an *assumpsit* is brought in the *Marshalsea*, whereas no party was of the Kings House, the Plaintiff recovered, the Defendants arrested the Plaintiff by a Precept, in the nature of a *Capias ad satisfaciendum*; and he brings false Imprisonment, and judgement given against the Defendants.

1. Resolved, the Steward and Marshal at the Common Law have two authorities: One general, as Vicegerents of the Chief Justice, in his absence, within the Verge: Another, as Judges of the *Marshalsea*. This last was limited to Debt and Covenant, when both are of the House, and to trespass, *Vi & armis*, where one is, but not if it concern Land; and because they have the general authority at will, and the other for life, they draw many cases to the *Marshalsea*, which ought to be in other Courts: Their Jurisdiction is *Fleta*, lib. 2. cap. 2. *Infra metas hospitii continentis* is *Leucas in circuitu*. And the Statute of 13. R. 2. 6. limits the 12 miles to be accounted about the King's Tonnell.

2. The reasons wherefore this special authority was given them, were,

1. Because the Suite there, is by Bill, by reason of their priviledge, which cannot be elsewhere.

2. In respect of the necessity of attendance of the Kings servants.

3. If Strangers shall be suffered to sue there, one Carman would sue another Carman there, *In aula Regis*, which were undecent, but the general authority vanished by the Act of 28 E. 1. c. 5. which ordained, that the Chancellour and Justices of the King should follow him: therefore *in Presentia Majoris cessat*, &c. and about 4 E. 3. the Court of K. Bench became Resident.

3. The Statute of *Articuli super Chartas*, is as much as an explanation of the great Charter, and the Charter of the Forest, and not introductory of a new Law; and the third Chapter of that Act explains the Iurisdiction of the Marshalsea, as before; and if he hold plea, otherwise a prohibition lyeth, and the party shall have an action upon the Case, as a consequent upon the Statute.

4. That part of the Statute which giveth them Iurisdiction in trespasss, shall be intended trespasss *Vi & Armis*.

5. This action lyeth against the Defendants, because the Court had not Iurisdiction, and so have not done it by command of the Judge; otherwise if the Court had Iurisdiction, but proceedeth *Inverso ordine*, or erroneously, as if a *Capias* be awarded against an Earl, &c. one who is indicted before Justices of the Peace, cannot approve. 1. Because he cannot assigne a Coroner. 2. Because it is out of their Commission; if a Court Leet be holden at another day than it ought to be, the proceeding is, *Coram non Iudice*, otherwise it is of a Court Baron, 6 R. 2. Action upon

upon the Statute *Plac. ultimo*, in the point, that judgement in the Marshalsea, when none of the parties is of the K. house, may be avoided by plea without any Writ of Error, which proveth that it is void.

Leonard Loveis Case, 11 Jac. fol. 78. In Ejectione firmæ, for 8 acres, &c.

L. L. seised of divers Mannors in soccage, and in chivalry: *In Carite*, maketh a feoffment to diverse uses, in an Indenture precedent, whereby he limits to himself for life, without Impeachment of waste, and to the use of his Lessees and Devisees, the remainder to his second Son in tail, &c. the reversion to himself with power of revocation, after he purchaseth 8 acres in soccage, and revoketh, as to certain Mannors holden in soccage, and deviseth them and the 8 acres to his eldest sonne, and the heirs Males of his body for 500 years, provided, that if he alien otherwise than for years determinable, upon the deaths of three persons, or less number, rendering the old rent, or dye without Issue Male, then to his second son in tail, with proviso to make Leases, according to 32 H. 8. only: *L. L.* dyeth, the eldest sonne enters into 8 acres, and dyeth, and leaving one Daughter, who married *R. D.* who enters into the 8 acres, &c. second sonne dyeth, having *L. L.* who enters upon *R. D.* and leaveth to the Plaintiff, who enters, upon whom the Defendant enters, and ejecteth, &c. and if the entry of *L. L.* the Lessor was congeable or not, was the Question: and it was adjudged that his entry was not lawful, and judgement was given against the Plaintiff; in this Case diverse points resolved, some at the Common Law, and some upon 32 and 34 H. 8. of Wills.

1. Resolv.

1. *Resolv.* If a man seised of three Acres of equal value, one holden in *Capite*, and giveth that and one of the other to his younger son in tail, he cannot devise any part of the third Acre, because he had executed his power, and if he purchase other Land in socage, he can devise but two parts of that, by reason of his reversion in *Capite*, expectant upon the estate tail.

Object. That the K. was once satisfied of the wardship by the statute, in respect of the Acre holden, and the reversion thereupon shall not hinder the devise of Land purchased after.

2. The statute doth not regard this seck-reversion, but inheritances of annual value. *Resp.* To the first, that this reversion shall hinder the devise, by the words of the statute, for he had a reversion of Lands holden, but although the statute saith, that he may alien two parts, by act executed or will, if he alien to one of the three uses by act executed, he may devise the reversion, for the statute is to be intended of an entire alienation; and where the statute saith in reversion or remainder, it is to be intended, that the Devisor be seised of such a remainder which draws wardship.

To the second it was answered, that things which of their nature are seck, are out of the statute, but not things which of their nature are of annual value, but are not of value in respect of some Lease or Gift, *Abq. aliquo inde reddendo*, and therefore seck reversionions are devisable by the said statutes; but if they be not, yet they shall not hinder the devises of other Lands: To make one able to devise by those statutes, the time of Having, Holding, and disposing must concur, and therefore if a grant to the second Son here, had been in fee, although with power of revocation, the devise had been good, because he

had no Lands *in capite*, at the time of the Devise ; if the Father conveyeth his Land to the use of his younger son, the eldest being within age, after the death of his father, he shall be in ward, although nothing descend : A true Child, and nor in reputation is within the statute ; and if the son purchase land *bona fide* of his father, this is out of the statute, because it is not for his advancement ; If Tenant in soccage devise, and after purchase land in Chivalry, the devise is void for a third part ; but if Tenant in Chivalry and soccage devise all, and after aliens the the Land holden, this is good. To make division, that the King shall have a third part holden, the Lands shall be taken according to their value at the time of the death of the Devisor. The time of provision that a third part must descend, needs not concur with the time of alienation, but it is sufficient that he had it at the time of his death. The estate to any of the three purposes, ought to continue to the time of death, and the Tenor must till after death, to make it within the statute, and the estate also of Lands holden, ought to continue after death ; therefore if the Tenant in tail, *in capite* devise soccage Land, & die without issue, this is good ; so privity must continue after death, therefore if he who made the conveyance be attainted, this is out of the statute : The uses to the second Son are in contingency, and not executed by 27 H. 8. by the power to make Leases, and Devise reserved to the Feoffor, and therefore the fee is in the Feoffor in the meantime ; so that having disposed of it, and being seised of it, he cannot devise the Land purchased after

It was objected, that the statute saith, lawfully executed in his life ; but here no use was to be executed in the second Son until after his death.

It was answered, that after his death the uses were

were derived out of the feoffment, and so are as it were executed in his life.

It was holden by the Chief Justice, that the remainder to the second Son is contingent, in regard no alienation is found to be made by the Eldest, and if there had been, then it would be repugnant, that after alienation the Land should remain to the second son; and so *Quidcumq; via data*, the remainder (as the case is) cannot vest in him, but this point was resolved by the Court. - 2. The revocation is good, although the Indenture precedeth the feoffment, and that the uses are in contingency, and that the Revocation is but in part, and the Chief Justice held, that the eldest son had but a term determinable, and the second an estate tail; but in this, the Kings Bench and Common-pleas differ in Opinion, and that if Lands be devised to one and the Heirs of his body for 500 years, the Executors shall have it, and not the Heir; and the devisee may alien it, for it cannot be entailed; and so in *Peacocks Case*, 28 *Eliz. Banco Regis*, it was resolved.

Doctor Leyfields Case, 8 Jac. fol. 88. in Trespass.

IN Trespass for Corn taken at O; C. the Defendant pleads Q. *Eliz.* granted the Rectory of O. C. to C. P. without shewing the Letters Patentes who demised to G. P. for 8 years, if the said C. P. so long lived, and that he, as Servant of C. P. took the Corn, and avers the life of C. the Plaintiff demurreth, because the plea amounteth to the general issue, and it was adjudged in the K. Bench that the Bar was insufficient, because the Defendant shewed not the Letters Patents, and error was brought in the Exchequer Chamber, because the plea amounts to the general issue, because the De-

pendant gave no colour, wherein judgement ought not to be given against the Defendant, but only to answer over.

1. Because he is not bound to shew the Letters Patents.

It was answered, that colour shall not be given, for colour shall not be given where the plea goeth to the bar of the right, for it would be in vain to give colour of right, and to bar him if he had right, as if a collateral warranty, fine, statute be pleaded, or if he claims by a waif, otherwise where he pleads a descent, for this doth not bar the right, but the possession; he who claims by sale in a Market overt, shall not give colour if he pleads generally, but if he pleads that I. S. was possessed as of his own goods, and sold them as in a Market overt, or waived them, there he shall give colour, because he confesseth no interest in the Plaintiff.

2. If the Defendant claims by the Plaintiff, he shall not give colour.

3. If the plea be to the Writ, or action of the Writ, no colour shall be given.

4. Colour shall not be given in case of Tithes, for to whomsoever the Lands belong, the Tithes belong to the Parson.

1. Colour ought to be a doubt to the Laygents.

2. It must have continuance.

3. It must be such a colour, that if it be effectual, will maintain the Action.

4. It ought to be given by the first conveyance.

2. Resolved, Lessee for yeares of Lessee for life of the K. must shew the Letters Patents, for he who is privy in estate or interest, or who justifieth in right of a party or privy, although he claim but part, must shew the first deed; and the reason that deeds are shewed to the Court, is, that the Judges and Ju-

ry (that which respectively to them belongs) shall judge of the sufficiency thereof; therefore a deed shall not be suffered to be given in evidence, by witnesses, or Copy, except it be burned, or some such inconvenience, but a Copy of a Record is good evidence: If a Release be made to Tenant for life, this inureth to the Reversioner, yet he cannot plead it without shewing *a Fortiori* here, because the Lessee may contract with the Lessor, to suffer him to have the deed to shew; but strangers who claim not the thing granted, nor interest out of it, need not to shew the Deed; otherwise if he claims the thing granted, or interest out of it; *Ergo*, the second grantee of a rent-charge must shew the first grant, but he who claims as Gardian, or meerly by the Law, without privity or power of providing the deed need not to shew it: But Tenant by the courtesie must shew it, because the deed was in his power living the Wife, otherwise of Tenant by statute, &c.

3. The not shewing of the deed is matter of substance, therefore judgement shall be given against the Plaintiff in the writ of Error, although it was not shewed as cause of Demurrer. And judgement was affirmed.

Nota, When a plea amounts to a general issue, if the Plaintiff demur especially, upon 27 *Eliz.* and the Defendant joyn, judgement shall be given for the Plaintiff.

Edward Seymors Case, 10 Jacob, fol. 95.

THe Lord Cheyney Tenant in tail; the remainde^r in tail to I. C. the reversion to the Lord C. bargains and sells, and levies a fine to the bargainee with warranty to him and his Heirs; the bargainee infeofeth the Lord S. who enfeofeth E. S; I. C.

dies, having issue T. the Lord C. dyeth without issue, Edward Lord S. leaseth to the Plaintiff, the Defendant by the command of T. ejected him; and judgement was given for the Defendant, and affirmed in Error.

1. Resolved, The Bargainee had an estate descenderable during the whole life of the Bargainor (whereof his wife shall have power) and also the reversion in fee expectant upon the remainder in tail.

2. The Fine after bargain and sale, is no discontinuance of the remainder, for this operates upon the Estate passed by bargain and sale, and corroborateth that, and maketh it determinable only upon the death of the bargainor without issue, otherwise if the fine had preceded the bargain and sale.

3. It was objected, that the Feoffment of the bargainee displaceth the Remainder, so that the warranty which descends upon him barreth him: but Resolved, that the warranty doth not bind him.

1. Because it was annexed to an estate determinable by the death of Tenant in tail, without issue, and to the Reversion in Fee, granted by the bargain and sale, and fine, and not to the Remainder in tail, and the Comisee by his own Act cannot make it to extend any further; therefore the estate tail being determined, the warranty ceaseth.

2. A Warranty barreth not an estate, which is not displaced at the time of the Warranty annexed, as if the Father maketh a feoffment of Land (out of which his son hath a Rent) with warranty, this binds not the son as to the Rent.

3. The feoffment was lawful, because he had fee; therefore he cannot make discontinuance.

4. A Warranty cannot enlarge an estate, the Remainder in tail to J. C. was not discontinued, for the Feoffor was not then seised by force of the tail.

5. A collateral Warranty may be given in evidence, if it be not pleaded, for although it giveth not a right, yet it barreth anothers right, and the rather in an *Ejectione firme*, and other personal actions, because in them it cannot be pleaded by way of bar.

Note, There are some Titles to which a Warranty extendeth not, as in case of Mortgage, Mortmain, consent to a Ravisher, for in these cases no Action lyeth, in which Voucher or Rebutter, can be, neither shall a Descent take away an Entry.

Bewfages Case, 10 Jac. Common-Pleas, fol. 99.

THe Sheriff upon a *Fieri facias* executed, did take an Obligation of the Defendant to pay the money in Court, at the return of the writ, and this was adjudged good: notwithstanding the statute of 23 H. 6. Before this statute the Sheriff could not let any person to bail which was taken, *ad respondend.* as may appear *Eliz. Na. br. 24. a & b.* and in 34 *Eliz.* in Debt by *Dawson* Sheriff of B. against *Burnam* upon an Obligation, the Defendant pleaded the statute 23 H. 6. and shewed, that one K. recovered debt and damages against him, and pursued one Writ of *Fieri facias* against him, directed to the Sheriff of B. and that he made the Obligation to the Plaintiff for the Execution, and that the Obligation was void by the statute, whereupon the Plaintiff demurred; and it was resolved.

First, that the Obligation was not within the statute, because that the statute extended only to such Obligations which any who is in their ward did make unto him.

Secondly, that the same Obligation was not void at the Common Law, whereupon the Plaintiff had judgement, and another judgement, 28 *El. Inter Burwey*

& Kett. upon an Obligation, taken by the Sheriff, *Pro solutione pecunie debite domine regine*, upon extent out of the Exchequer.

Now it is said in the latter clause of the act, that if any of the Sheriffs or other Officers or Ministers aforesaid; take any Obligation in other form, by colour of their offices, that it should be void, &c. There are two manner of forms, (*Viz.*) *Forma verbalis*, & *forma legalis*: *Verbalis*, stands upon the Letters and Syllables of the Act, *Forma legalis*, is *Forma essentialis*, and stands upon the substance of the thing to be done, and upon the sense of the statute, *Quia notitia rationum hujus Statuti, non in sermonum foliis sed in rationis radice posita est*, and according to this distinction this branch of this statute is to be expounded, and therefore in 37 H. 6. 1. If the Sheriff take a single obligation of one in his ward that was bailable, this was void, for this Obligation wants essential form, prescribed by the statute; for the condition prescribes the fault, which is part of the substance. And there Moyle said, that if the Sheriff let one to Bail or Mainprise, that is excepted in the statute, and not mainpernable, and take a simple obligation, that the same is void, *Quod alii Justitarii concesserunt*, for by the exception it appeareth, that it was not the intention of the statute, that such should be let to bail, and therefore the obligation is taken in another sense than the statute intends. And it seemeth to me, that as well in the same case of 37 H. 6. as in the principal Case of *Dive and Manningham*, Plow. 67. the Obligation which had the condition to save the Sheriff harmless (when the Sheriff against the Law, putreth one to bail who is not bailable) is against the Law, and void by the Common Law. And with this accordeth *William Wissham* Case, 15 Eliz. Dyer 224. and in 7 E. 4. One was in custody of the Sheriff,

by force of a *Capias*, upon an indictment of the Trespas, and the party maketh the Obligation to another, by the direction of the Sheriff, upon this condition, as the statute prescribes for the surety of the Sheriff, &c. and there it is holden that the obligation is void, because the statute prescribes, that the obligation shall be made to the Sheriff, and that is part of the essential form; and so if the Sheriff add to the condition, that he shall be kept harmless against the King and the Plaintiff, &c. This is void; so if a Gaoler or Sheriff take an Obligation of the person, with condition to be true Prisoner, or to pay for his meat and drink. So if the Sheriff add any thing to the matter prescribed by the statute, as to pay such a sum of money for a Horse, &c. This condition maketh all the Obligation void, for it is taken in another form (touching the substance of the matter) than is prescribed in the statute; but in *Pasch. 27 Eliz.* in the Kings Bench, in an Action of Debt brought by *Sir William Drury*, late Sheriff of *Suffolk*, upon an Obligation of 20 *l.* against *A. B.* it appeared that the Defendant was solely bound in the same, and with condition, that one *Moore*, whom the Sheriff had arrested upon a *Latitat*, should appear in person at the day contained in the Writ, the Defendant pleaded the statute 23 H. 6. and that the Obligation was made in other form than is mentioned in the statute, whereupon the Plaintiff demurred in Law, and it was objected that there were three variances from the statute, *Viz.* one in the Obligation, and two in the Condition: First, in the obligation, for that there was but one surety, and the statute prescribes reasonable surety of sufficient persons in the Plural number, having sufficient within the said County, &c. in which Case there ought to be two sureties at the least, and the Plural number cannot

cannot be satisfied with the singular number, and so contrary to the word of the statute. And so was the Opinion of *Mountague* Chief Justice of the Common Place, in the case of *Dive* and *Manningham*.

Also, in the condition that the Prisoner should appear in person, where the words of the statute are, that he should appear (generally) without these words (in person.)

2. That he should appear at the day, &c. *Ad respondendum*, where these words *Ad respondendum* are more then the statute prescribes, and therefore the Objection is voyd, &c. but it was resolved by *Sir Christopher Wray*, *Sir Thomas Gaudy*, and all the Court, that the Obligation was not voyd, by the said Act.

For to the first; The words *reasonable surety of sufficient persons*, are added for the surety of the Sheriff, and therefore if he will but take one surety, be it at his peril, for he shall be amerced if the Defendants appear not; and therefore the statute doth not make void the Obligation in this Case; for the same Branch that requires form, requires also that the Obligation shall be made to the Sheriff himself, by the name of his Office, and that the Prisoners should appear, in which clause no mention is made of the sureties, so as the intent of the Act was, that in so much as it was at the peril of the Sheriff to leave to his discretion, to take one or more for his indemnity, and although the sureties have not sufficient within the same County as the statute mentioneth, yet the Obligation is good: For these words of the Act, (as to this point) are more for counsel or direction of the Sheriff, then for precept or constraint to him, and that for the safety of the Sheriff; for if the Defendant cannot find two sufficient persons, having sufficient within the same County, the Sheriff

Sheriff is not bound to let him to Bail, and this resolution agreeth with the antient Rule, *Quilibet potest remittiare iuri per se introducto* And as concerning the second Additions to the condition of the said Obligation, more than is in the statute;

It was resolved, that true it is, there is a Verbal difference of the form prescribed by the statute, but not in the substance and effect; for he that is so letten to baile, ought to appear in person, for so much is implied in the words of the Act (shall appear) and by the Common Law, every Tenant or Defendant ought to appear in proper person; and with this accordeth *Fitz. Na. br. 25.* and he that ought to appear, ought to appear *Ad respondend. Et parum differunt que re concordant, & est ipsorum legislatorum tanquam viva vox, rebus & non verbis legem imponere, vid. Dyer. 21 Eliz. 364.* where the condition was in the conjunctive (appear and answer) and yet the Obligation good, 27 *Eliz* in *Darby & Helthcat*, if a Gaoler or Sheriff, for ease or enlargement of any Prisoner, take promise to save him harmless, that although the statute speaketh only of Obligations with condition, yet it is an equal mischief. And *Wray* Chief Justice said, that the statute should serve for small or nothing, if the premises should not be taken to be within the statute, and the latter clause is general, *Viz.* If the Sheriff take any Obligation in the other form, that it shall be void, and within the equity of these words (any Obligation) an Assumpsit is comprehended, for the antient Verses are:

*Verba ligant homines, taurorum cornu boves,
Cornu has capitur, voce ligatur homo.*

Quando verba Statuti sunt specialia, ratio autem generalis

lis, generaliter; Statutum est intelligendum: It was said that the *Assumpsit* did not bind the Prisoner at the Common Law, because the consideration was against the Law; *vide Dyer 19 Eliz. Oneleyes Cose.*

Alfridus Denbawds Case, 10 Jacobi, fol. 102. In Error.

ONE Jury only appeared at the Assizes to try an Issue in Trespass, a *Tales de circumstantibus* is awarded at the prayer of the Plaintiff; the Title of which was, *Nomina decem Talium*, and verdict and judgement was given against the Defendant, who brings Error.

It was objected, 1. That the judgement was erroneous, for the Title being *Nomina 10 Talium*, the Sheriff cannot return 11.

2. Because the statute speaketh of these persons that were before impannelled, which cannot be satisfied where one only appeareth, as the statute of *Westm. 2. c. 11.* is not satisfied with one Auditor; so of the statute of *Merton c. 3.* of Redisseisin: It was resolved, that the *tales* was well awarded for the statute shall be taken beneficially in favour of speedy Trials, and the Title is the misprision of the Sheriff, which shall be amended.

The time of granting the *Tales*, is, when so many of the Jurors make default, that the inquest cannot be taken; if two of the principal pannel appear, and at the prayer of the Plaintiff twelve *de Circumstant.* are returned, and then the two Principals are withdrawn; now the Trial shall be all by the 12 *de circumstant.* but the Lord Dyer made a quere of that: if one of the Jurors dye before the Verdict be given, a *Tales* shall be granted, he who is merely a Defendant cannot pray a *Tales*, until default be made by the

the Plaintiff, the number ought to be under the number in the Principal-pannel, except in an Appeal, because there the Defendant may challenge peremptorily: the number shall be diminished in every new *Tales*, and they ought to be of the same quality with the former, as if the principal-pannel were *Per medietatem lingue*, so shall the *Tales* be: Justices of Assize shall not award a *Tales*, *de circumstantibus* in an assize; for the statute of 35 H. 8. c. 6. speaketh where the Trial is, *Habeas corpora, distringas*, or *Nisi prius*, for an Assize cannot be taken by *Nisi prius*, but must be taken in the proper County; and after, by advice of all the Justices of the Common-place, and Barons of the Exchequer: the judgement was affirmed.

Humphrey Lofields Case, 10 Jac. fol. 106.

In debt upon Bond.

D. Leased for a year to *H. L.* and if the parties shall please to renew the term at the end of that year, that he shall have for three years, rendering 40 *l.* per annum; *H. L.* bindeth himself to perform Covenants, and faileth of payment of 20 *l.* at Christmas Quarter; *D.* bringeth debt: It was resolved for the Plaintiff. It was objected against the Action.

1. That the reservation was upon a contingency, if the term shall revive.
2. Because the reservation is *durante termino predicto*, *Viz.* the last Term.
3. The reservation shall be taken strictly, because of the words of the Lessor.

But it was resolved, that the reservation extendeth to the first year, for the proper place of a reservation is after the limitation of the estate; as if a Lease

Lease be made with divers remainders over, reserving Rent, this goeth to all; and although the second Term be in contingency, yet the first is certain, and *Termino prædicto* significeth both the terms, for it is *Nomen collectivum*; and the reservation shall be taken reasonably, according to the intent of the parties. Tenant in tail of an Acre in Borough-*English*, and of another by the Common Law by an Oxe, dyeth, having issue two sons, the service shall not be increased: And increase is only between very Lord, and very Tenant, for there may be increaser, but not where there is a reversion; or if the Seigniorie be by Deed, and services are reserved within time of memory, for he shall have no more than himself reserved: In the Case at Bar, in respect the Obligation was forfeited, the Court moved the Plaintiff to take his Arrerages, Costs, and Damages, with which he was contented, and so no judgement was given.

Arthur Legats Case, in subversion of pestilent Patents, of theevish Concealors, 10 Jac. fol. 109. in Communi Banco.

THe King *ex certa scientia, &c.* grants fifteen Acres as concealed, which were parcel of a Mannor of the profits whereof the King was answered: Nothing passeth.

1. *Resolv.* If the King were answered of the old Rent of the Mannor, and the Fermors &c. suffer one to intrude in part, this is not concealed. 2. The grant is void; for *que quidem, &c.* is the suggestion of the party.

2. This is a clause of restraint, and nothing passeth which is not concealed.

3. The King did not intend to diminish his Revenue

nue

nue which will be if the grant be good.

4. The clause, *que quidem*, hath a double conjunctive, *concelata & detenta*, and Land cannot be detained from the King.

3. *Ex mero metu, &c.* aideth it not.

4. If the Officers of the King may by matter of Record, have notice of putting the Land in charge in Court of Record, and do it not, yet this is not concealed, and if the clause *que quidem* be added for more certainty, the grant shall not be vitious by it, if it be false; as if a Mannor be granted, *quod quidem* was in the tenure of I. S. where it was not, this is good: If one substraft, or take the Kings Rents, this is not concealed, for the King may charge him as Bailly, and the Law will make a privity: See the statute of 4 H. 4. cap. 4. called in the *Rolle Brangwyn*, in English *White Crow*. And it was said that Perpetuities, Monopolies, and Patents of concealment, were born under one unfortunate constellation, for as soon as they came in question, judgement was ever given against them, and none ever for them, and they have all two inseparable qualities (*Viz.*) to be troublesome and fruitless.

Robert Pilfords Case, 10 Jacobi, fol. 115.

THE Plaintiff in trespass, counts to damages of 40 l. and at the *Nisi prius*, the Jury assessed for damages 49 l. and 20 s. costs, at the day in *banke* he released 9l. parcel of the damages, and had judgement of 40 and 10 l. for costs *de incremento*, the Defendant brings error, because the damage and costs surmounts the sum in the Court; but judgement was affirmed; for in real actions before the statute of *Glocester*, 6 E. 1. cap. 1. no damages were recoverable, but in personal actions and mixt they were,

were, and by that statute a man shall have costs in all cases where he recovers damages, *Viz.* before, or by the same statute; therefore if after this, damages are given where they were not at the Common Law, costs shall not be recovered, as in a *Quare impedit*, but if a statute after this give double or treble damages, where damages and costs were by the Common Law; there the plaintiff shall recover the damages increased, and costs also; but in waste against Tenants for life, costs shall not be recovered, for although this statute was at the same Parliament, yet it was an Act of Creation, and therefore no costs: And true it is, that damages include costs in a general sense, but in the count it is taken for damages, before the Action brought in a relative signification, therefore *expensæ litis* may be added to it, although he count not of them; as a man shall do in real actions without counting of them, because he shall recover them pending the Writ. *In entree sur disseisin*, the Plaintiff shall recover damages from the disseisin to the Writ of inquiry, &c. and if the issue be tryable by verdict, &c. to the verdict; but in a *Præcipe* of Kent of his own possession, he shall recover all Arrears to the judgement: judgement affirmed by all.

Cheyneyes Case, 10 Jac. fol. 113.

IN a *Valore Maritagii*, issue is joyned upon the tenure, and found for the plaintiff, but the Jury did not inquire of the value: Adjudged the verdict is sufficient, and shall not be supplied by a Writ of inquiry.

1. In this Writ three things are to be recovered, the Value, Damages, and Costs; and although the issue be joyned upon the tenure, yet as a consequent upon

upon the issue, and their charge they ought to inquire of the value, if they find for the Plaintiff; as in an Assize, if issue be joyned upon a release, and found for the Plaintiff, yet the recognitors must inquire of the seisin and disseisin; and this defect shall not be supplied with a Writ of Inquiry, because then the Defendant would be prevented of his Writ of Attaint: But if the Court ought to inquire of things whereof no attaint lyeth, this being but of Office, it may be supplied by a Writ of Inquiry, as the four points in a *Quare impedit* (viz.) *de plenitudine ex cuius presentat one, si tempus semestre transierit*, and the value of the Church *per annum*: and in the Case at Barr by the rule of the Court, a new *Venire facias* was awarded.

The Case of the Mayor and Burgeses of Lynn Regis, touching mis-naming of Corporations, 11 Jacobi; fol. 122. Communi Banco.

H. 8. in the 29th. year of his Reign, did incorporate that Town by the name of *Maioris, & Burgensum burgi domini Regis de Lynn Regis*, & one made an Obligation to them by the name of Mayor and Burgeses of *Lynn Regis*, omitting these words, *Burgi Regis*; this is good, because it is the same name in substance, and doth not vary in material words; and though it be not *Idem nomen syllabis*, yet it is *Re & sensu*; for Burgeses, that implies it is a Burrough; for Burroughs and Burgeses are *conjugata*; and by *Lynn Regis*, it appears that it is *Burgus suus* (i. e.) *Regis*; à fortiori, because there is no other Coporation of the same name. *Apices juris non sunt jura*. There may be a difference between ancient Corporations, and new; for ancient Corporations may by usage have several names; and the Mayor and Burgeses (notwithstanding

withstanding *non est factum* pleaded) had judgment to recover.

William Cluns Case, 11 Jacobi, fol. 127. Banco Regis.

A Lease for years, if the Lessor should so long live, rendring Rent at the four Feasts, or within thirteen weeks after; after one of the Feasts the Lessor dyeth, and before the thirteen weeks be past, the Executor brings debt against the Lessee, and the Defendant demurreth upon the Count, and it was adjudged a good demurrer, and that the action did not lye.

1. Because the disjunctive is added for the benefit of the Lessee; and the first day was but for voluntary payment, but the legal time of payment was the end of the thirteen weeks, before which, when the Lessor dyeth, the Lessee is discharged by act of God for that Quarter; if Lessee before the day, pay the Rent, this is voluntary, and not satisfactory, but it is good to give seisin; if payment be in the morning, and the Lessor dyeth at noon; this is voluntary and satisfactory against the heir, but not against the King: Payment the last instant of the day is satisfactory, and after the day it is coercive and satisfactory.

2. When the first day is past, it is as if the Rent had been only reserved the second day; for the election is good.

3. The Rent is to be paid out of the profits of the land; *ergo*, in regard of time it shall not be apportioned; and if the Lessor dye betwixt the first day, and the last day, his heir, and not the executor, shall have the Rent, because it was not then due, if a man lease for years, rendring Rent at M. or within a month after, with a condition of re-entry, and

and the Lessee renders it at the last instant of M. the Lessor shall not re-enter upon demand the last day of the month, because the Lessee had liberty to pay it then; and the difference was taken betwixt the said disjunctive Reservation, and when the reservation is at a certain feast, and a condition is added, that if it be arrear by the space of a month after the feast, that then the Lessor, &c. there the Lessee for salvation of his lease, cannot render it at the last instant of the feast, because he had no such liberty, as in the other Case: A lease for years rendering Rent at M. or within twelve daies after, upon condition to re-enter, if it be arrear by the space of twelve daies after any of the said feasts, or dayes, the Lessee shall have twenty four daies in safeguard of his lease after the feast of M. and in the case at Bar judgment given, *quod querens nil caperet per billam.*

*James Osburnes Case, 11 Jacobi, fol. 130.
Banco Regis.*

IN an action upon the case, for the Plaintiff had bought of the Defendant divers goods which he refused to deliver, whereof one was *unum fulcrum lecti*, *Anglicè* a Field Bedstead with a Testern, and Curtains of Saye; the Plaintiff recovers, and damages assessed intirely, where none ought to be given for the Testerne, &c. for *Fulcrum* signifieth a Bedstead only, upon error brought therefore, judgment was affirmed; for one thing only is here put in issue; for the other things are not alledged *positive sed expositive*, and are nagation: but when two things are put in issue, or *Obliquè* inquired of by the Jury, there it is not good; and it shall not be intended that damages were given for that only, for which the

action was brought, but in an action upon the Case for words spoken at one time, whereof some are actionable, and some not, there damages may be assessed intirely, and shall be intended to be given for the words actionable only.

1. Because the Plaintiff must declare as the words were.

2. Because the words not actionable aggravate the damages; otherwise, if spoken at several times; but here damages shall be intended to be for that which is actionable only, and the rest, as if never alledged: and in Writs or Pleas, English words are not admitted by 36 E. 3. cap. 15. except they be parcel of a name, as *Jo.* in the *Hall.* 2. Words which pass under the name of Latin, are,

1. Good Grammatical Latin.

2. Words significant in Law, and not in Grammar.

3. Incongruous Latin, which doth not vitiate a Plea, or Grant, nor Judicial Writ.

4. Words insensible, having no countenance of Latin, and are rejected; but feigned words, as *Velnetum*, *Stapedia*, &c. are good.

Read, and Readmans Case, 10 Jacobi, fol. 134.

THE Defendant in Debt brought by two Executors, pleads the death of him who was summoned and severed.

Resolv. The Writ shall not abate; if two purchase an original real action, and one dyeth pending the Writ, this shall abate in all, as in case of Joynt-tenants, or Parceners, where one dyeth having issue, or no issue, because that she may have a Writ for the whole, and shall not recover a moyety, and one shall not recover upon a false real Writ, or unapt for his Case, in respect he may have an apt Writ, although

though it happen after by act of God; but if two purchase a Judicial Writ, and one is summoned and severed, and dies without issue, the Writ shall not abate; the same law where Joynt-tenants, but if the Coparcener had issue, then it shall abate: If one of the Plaintiffs after summons and severance marrieth, this shall not abate the Writ. In personal and mixt actions, although an intire Chattel be demanded, the death of one after summons and severance doth not abate the Writ; as in a Writ of ward of the body: In a *Quare impedit* without severance, &c. If one dye, the Writ shall not abate, because thereby the other should be dis-inherited, as upon penaltie, and six months passed; but without question, if one of the Plaintiffs in a *Quare impedit* be severed and dye, the Writ shall not abate; where the Plaintiffs are only to discharge themselves, the Writ shall not abate by the death of one of the Plaintiffs or Defendants, and therefore there the Non-sute of one, is not the Non-sute of the other, but otherwise it is in a Writ of Error: Note, summons and severance is before apparance, and Non-sute after apparance, where the severance is without Process.

Richard Smiths Case, 10 Jacobi. fol. 135.

R. S. bring a *Quare impedit presentare ad medieta-tem Ecclesie*, and adjudged the Writ was good. None shall have such a *Quare impedit*, but when there are two several Patrons: And two Incumbents of the Church; therefore if two present by turn, the *Quare impedit* must be *presentare ad Ecclesiam*: when the Register giveth a Writ for the whole; this is a good warrant to bring it of any part, if the case will warrant it; but it seemed to the Chief Justice, that in the Case at Bar, the Writ might have been

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good,

404 *The Case of Chester Mill.* Lib. 10.
good *presentare ad Ecclesiam*, for as to him it is one
Church.

*Cases upon the Commissioners of Sewers,
7 Jacobi.*

*The Case of Chester Mill upon the River of Dee,
fol. 137.*

ADjudged that the statute of *Magna Charta*, *Omnes
Kidelli deponantur* extends only to open Weares
for taking of Fish; and that Commissioners of Sewer
cannot subvert a Causey, &c. erected before the
time of E. 1. but by the statutes of 25 E. 3. cap. 4.
and 1 H. 4. cap. 12. if they be inhaunced, they
ought to be amended by abatement of the inhaunce-
ment; and the Causey in question was erected before
the time of E. 1. and never since inhaunced, and
therefore out of all the said Statutes.

Keighleys Case, 7 Jacobi, Communi Banco, fol. 139.

IT was resolved, that if one be bound by prescrip-
tion, to keep a Wall *contra fluxum maris*, and the
Wall is subverted by a sudden inundation of waters,
salt or sweet, by the Statute of 23 H. 8. cap. 5. the
Commissioners have power to tax all equally, who
have damage by such surrounding, for no default
was in the party; so if the Wall be in inevitable dan-
ger, but if it be through his neglect, each one may
have his action upon the case against him; and if the
danger be not inevitable, he only shall be char-
ged.

2. *Resolv.* By the said Statute, the Commissioners
are not bound to observe the customs of *Roman
Marsh*

Marsh, but where such customs are in any places within their Commission.

3. According to your wisdoms and discretions, in the said Act, are to be interpreted according to Law and Justice; for every Judge or Commissioner ought to have *duos sales, salem sapientia ne sit insipidus, & salem conscientia ne sit Diabolus*: and discretion is, *scire per legem quid sit justum*: and every of their Ordinances ought to consist upon four causes.

1. The material cause, and that is the substance.
2. The formal cause, and that is the manner.
3. The efficient cause, that is their authority.
4. The final cause, and that is, for the publick good.

The Case of the Isle of Ely, 7 Jacobi, fol, 141.

THE Commissioners of Sewers decreed, that a new River shall be cut out of Owse, seven miles within the main soyle of the Isle, and for the doing thereof, and for the effecting thereof, taxed divers Towns in the County of C. out of the Isle generally; that is, so much upon every Town: 2 Questions.

1. If the Commissioners have power to make such a new River.

2. If such a general Tax be lawful.

By the Common Law the King ought to defend the Realm, as well against the Sea, as Enemies, and to provide that the subjects may have safe passage over Bridges, and High-waies, and therefore if the Walls of the Sea, or Gutters be not scoured, he ought to award a Commission, to inquire of such defaults as by the Register amongst the Commissions of Oyer and Terminer. See there a president, 44 E. 3. for reparation of ancient Sewers, &c. or making them new, but the Statute of 6 H. 6. cap. 5. and divers others,

for making new Walls, &c. were only temporary, and that power is omitted in the Act of 13 H. 8. c. 5. which is made perpetual by 3 E. 6. cap. 8. and so the Commission in this point insueth the Commission which was at the Common Law: Therefore it was resolved, that the Commissioners in this Case could not make the said New River, because their Commission extends only to the reparation and new making of ancient Walls, Gutters &c. And it would be hard to give power to Commissioners to try new inventions to charge the Country, which may never take effect: And it appeareth by the Register 152. that a New River ought not to be made, and the Old stopped, without an *ad quod damnum*, and the Kings license; yet when a new Sewer is to be made, any small alteration for the publick good of such a place may be made; so of an ancient Wall against the rage of the water, in case of inevitable necessity; but if by timely reparation, that peril may be avoided, no other ought to be made: *Si affuctis mederi possis, nova non sunt tentanda*: but if new inventions appear profitable, contribution must be voluntary, and not by compulsion, and in 3 Jacobi, Popham Chief Justice, preferred a Bill in Parliament to make a New River in the Isle, but it was rejected.

2. *Resolv.* None ought to be taxed, but he who may have damage by the default, or profit by the reformation; also the assessment must be according to the quantity of their lands, and number of acres, and according to the rate of every mans profit and portion, and the taxation in general was not warranted, but it ought to have been in particular upon every owner or possessor, observing the said qualities. Some Statutes of Sewers are *in defendendo & reparando Wall ac, &c.* Some *in destruendo & amovendo noementa*; and some touching both.

*In the Court of Wards.**Scroops Case, 10 Jacobi, fol. 143.*

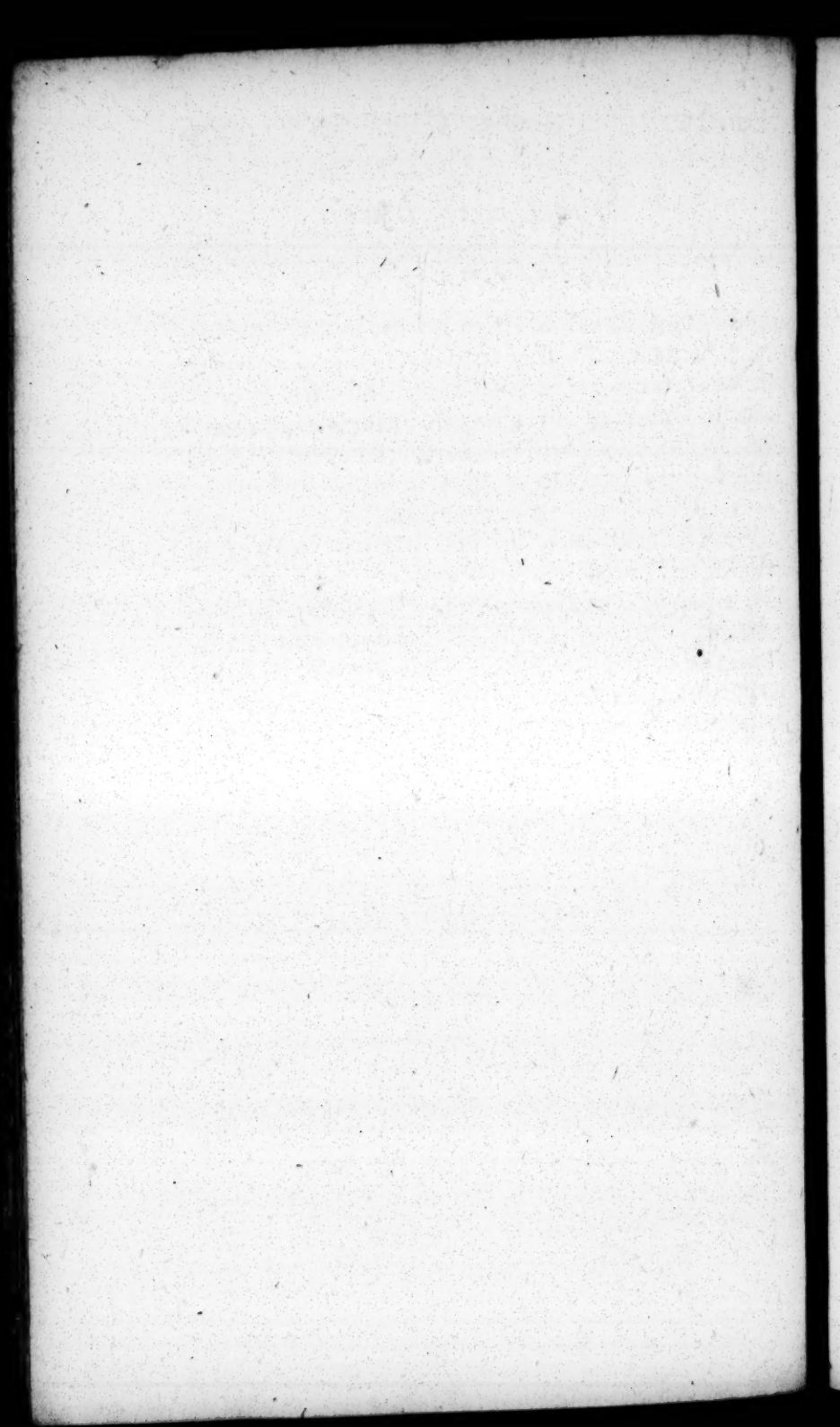
N.S. made a Feoffment to divers uses, with power of revocation by Indenture, and after by another Indenture (observing all incident circumstances prescribed) the Feoffor covenanteth to stand seised to several other uses.

1. This inureth to a revocation.

2. To raise new uses: and so it was resolved in the Kings Bench, between *Frampton* and *Frampton*, *Tr. 2 Jacobi*. *Quia non refert an quis intentionem suam declaret verbis, an rebus ipsis vel factis*, and when he limits new uses, he signifieth his purpose, to determine the uses before.

The End of the Tenth Book.

THE





THE ELEVENTH BOOK.

The Lord de la Wares Case, 39 Eliz. in Parliament, fol. 1.



HOMAS de la Ware, great Grandfather of the now Lord in 3 H. 8. was summoned to the Parliament by Writ, and by 3 E. 6. it was enacted, that *William* the Father of the now Lord *Thomas* shall be disabled to claim any dignity, during his life, notwithstanding *W.* was called to Parliament by *Q. Elizabeth*, and sat as Puisne Lord, and dyed, and *Thomas* now Lord, sued in Parliament to the *Q.* to be restored to the place of his Great Grandfather, that is, betwixt the Lord *Barkly*, and the Lord *Willoughby of Eresby*, and resolved, that he should be restored; for his Fathers disability was not absolute by attainder, but only temporary and personal, during his life, and the acceptance of the new Dignity shall not hurt the Petitioner, the Father being then disabled, and an Esquire only; so that when the old and new Dignity descend together, the old shall be preferred: which resolutions by the Judges was well approved of by the Lords Committees, and after confirmed by the Queen.

Auditor

Auditor Curles Case, 7 Jacobi, fol. 2.

Queen Elizabeth grants *Officium unius Auditorum Curie Wardorum*, to W. T. and W. C. for life, & *eorum diutius viventi*, the K. grants it in reversion to I. C. and I. T. I. C. dyeth, the K. grants it in reversion to R. P. W. T. dyeth.

1. Resolv. The grant of the Office *unius Auditorum*, &c. is good to two, and the survivor of them; for 32 H. 8. c. 46. maketh the two Auditors one Officer, and the word *unius* is not numerative, but denoteth the unity of the Office.

2. In such a grant the words & *eorum diutius viventi*, are not void, &c. for otherwise by the death of one of them, the interest of both would be ended; but now the survivor remains Auditor, and another shall be added to him; and till another is added to him, his voice in Court is suspended, because by the Statute there must be two; so if the K. grant by a Patent to one, and by another to another, this is good; and, until the second is added, the first hath no voice in Court.

3. The Nomination of Auditors, ought to be under the great Seal.

4. This Office cannot be granted in reversion.

1. Because it is judicial, and one cannot be Judge in *futuro*; and perhaps he was sufficient at the time of the grant, but not when it takes effect.

2. Although it be in part judicial, and in part ministerial, yet it is intire; and although ministerial Offices may be granted in *futuro*, yet this cannot, because it is inseparably judicial also; for the K. cannot grant the judicial part to one or two, and the ministerial to others.

3. If the grant be good, as to the ministerial part, yet

yet it shall not take effect now, because one of the ancient Officers is living, and if he should exercise the ministerial part, with the survivor, there would be three Offices,

5. He who surviveth, remains Auditor, yet had no voice in Court, until the King add another to him.

6. The grant to P. is void.

1. Because in reversion.
2. Because it reciteth a void grant to I. C. and I. T. as good, and so the K. is deceived of his grant.

Sir John Heydons Case, 10 Jacobi, fol. 5.

Sir J. H. brings trespasss against F. C. T. C. and I. C. F. C. appeareth, against whom the Plaintiff declareth, with *Simul cum, &c.* who pleads *Non culp.* so doth T. C. which issues were tried severally, and the issue between the Plaintiff and F. C. was first tried, and damages assessed to 200 l. and the other against T. C. 50 l. I. C. appears, and confesseth the Action, a Writ of Inquiry of damages is awarded, but none issued, judgment for the Plaintiff, and affirmed in Error.

1. Resolv. In trespasss against divers, who plead *Non cul.* or several pleas which are found in all for the Plaintiff, damages shall not be assessed severally, although one did more wrong than another, because the trespass is intire, and the Act of one, is the Act of all; but if they be found guilty at several times, they may, and if the Plaintiff confess the trespass to be at several times, the Writ shall abate.

2. If two trespasssors plead severally, both shall be bound with the damages taxed by the first Jury, and the other shall have an attainr, although he be a Stranger to the issue, because he is privy to the charge

charge; if one of them after appearance make default, a writ of enquiry shall be awarded to save a discontinuance, but none shall issue, because he shall be contributory to the damages taxed by the Jury, who tryed the other issue, and the other shall not be charged in damages assessed upon a writ, whereupon he can have no attain; but if the other issue be found against the Plaintiff, then it shall issue.

3. Although there was a discontinuance against I. C. because in the common place, where the Action was brought, there is no continuance after a writ of enquiry, (otherwise it is in the Kings Bench) yet it is aided by the Statute of 32 H. 8. c. 30.

4. If two Juries give a verdict at one time, the Plaintiff shall have Judgment, *de melioribus damnis*, if he will; but *fiat nisi unica executio*, in trespass against divers who plead several pleas triable by the same Jury, if the Jury sever the damages, all is vicious.

Priddle and Nappers Case, 10 Jacobi, fol 8.

THE Plaintiff in a prohibition declareth, that the Prior of M. was seised of 22 acres, and of a rectory, time out of mind, &c. until the dissolution, &c. and so, for all that time held them discharged of Tithes, and conveyes the said 22 acres from the King, to himself, and that the Defendant *Proprietarius rectorie prædictæ* sued the Plaintiff for Tithes, the Defendant traverseth the prescription of discharge, the Jury found that the Prior, time out of, &c. was seised of the said 22 acres, and of the advowson of the Rectory, and did appropriate it by Licence, 20 H. 8. the Incumbent then being living, who dyeth, and that the Prior held it united to the dissolution: judgment for the Plaintiff.

1. Resolv.

1. Resolv. Although that every Church parochial, is supposed to be presentative, yet the Plaintiff may plead, that the Prior, &c. time out of, &c. were Rectors of it; for this amounts to so much, that it was impropriated, that he needs not shew how, because before the time of memory; but the conclusion of the prescription of unity, *viz. Ratione cuius*, he was discharged of Tithes was not good, for Land is not discharged of Tithes by unity, but by payment of them, notwithstanding the mistaking of the conclusion doth not vitiate the Count, when the cause to have a prohibition, is good.

2. The plea of the Defendant to have a prohibition, is not good, because he traverseth the conclusion, *viz. the Prescription of discharge*, where he ought to traverse the prescription of unity; for the conclusion is not traversable, and because it is matter in Law.

3. The issue is not well joyned.

1. The matter of discharge is by reason of discharge by the Statute, and the issue is by discharge at the common Law.

2. In every issue there must be an affirmative and a negative; but here is no affirmative, for the conclusion is no affirmative, but an inference.

4. The impropriation is sufficient, although the License were general, and the Incumbent living; for it shall be construed in such a special sense, that it may take effect, and the License is alwaies general; for the Incumbent may dye or resign, before the impropriation.

5. Admitting the impropriation void, it had not been made good by 35 *Eliz. c. 3.* for this settles in the K. all possessions of Abbeyes with qualification, notwithstanding any defect in any surrender, &c. which intitlith the K. and this defect is not within
this

the qualification, but if the impropriation had been good by reputation, and so used, this had been given by the Statutes of 27, and 31 H. 8.

6. If the Jury found matter to barr the Plaintiff, this is not to be regarded, because an Attaint lye-eth not, nor the Witnesses punished for perjury; that matter not being material, to the issue.

7. Resolv. That perpetual unity until the dissolution is by the Statute, *prima facie*, a discharge of payment of Tithes, except that the Farmors have paid Tithes, and such an unity ought to be *iusta, equalis*, that is, free in one, and other, *perpetua & libera*; but if the Abby were founded in time of memory, he cannot at all; and here it appeareth that the impropriation was made in 20 H. 8. so that it appeareth to the Court, that before that the twenty acres were charged with Tithes; for of common right all Lands ought to pay Tithes; therefore the Chief Justice concluded, that the said twenty acres (as this Case is) were chargeable with Tithes; but in regard the information is good, and the plea *pro consultatione habenda*, altogether insufficient, and the Verdict impertinent to the issue, they would not grant a Consultation.

Doctor Grants Case, 11 Jacobi. Communi Banco,
fol. 15. In a Prohibition.

1. **R**ESolved: It is a good prescription that every Inhabitant in a Parish, have paid 2 s. in the pound, of the value of their Houses, *per annum*, in lieu of Tithes, because it may have a lawful commencement; for it may be, that this was so time out of mind for the Lands whereupon the Houses were built, as a *Modus decimandi*.

2. That

2. That the Parson may sue for it in the Court-Christian, for that it is in the name of Tithes; and every ancient City and Butrough, had for the most part such a custome for their Houses, for the main-
tainance of their Parsons, and obventions include ob-
lations, rents, or other revenues; and after a consul-
tation was granted.

Sir Henry Nevils Case, 11 Jacobi, fol. 17.

IT was resolved, that a customary Mannor may be holden of another Mannor: and there may be Lord, Measn, and Tenant of it, and such a customary Lord may hold Courts, and grant Copies, and such a Mannor shall pass by surrender and admittance, and fines shall be paid upon alienation or descent, and if it be forfeited, the Lord shall have the services as annexed to the Mannor; so if a Tenant at will, &c. admit Copy-holders reserving Rent, this shall go with the Mannor, after the Will determined; and so note a difference between the reservations at the Common Law, and by the custom of the Mannor. And it was said, that the Mannor of *Aylesham* in *Norfolk*, is holden by Copy, and others in divers other places; And judgement was affirmed in Error.

Dokter Ayries Case, 11 Jac. fol. 18.

14 E. 2 the K. licensed R. de E, to Found in Oxford a Hall, *sub nomine aulae Scholarium Reginae de Oxonio*, in the exemplification 8 Jac. it was *sub nomine aulae Reginae de Oxonio*, they present to the Church by the name of *praeposit. Coll. Reginae in universitat. Oxonie & socior. & Schollar. ejusdem*; the Incumbent deviseth the Rectory, & they by the name of *praeposit. Socior. & Scholar. Aulae vel Collegii Reginae in uni-*

E c
versitate

universitate Oxonii, confirm the demise; and notwithstanding these variances it was adjudged, that as well the confirmation as the presentation was good, and the sole doubtful variance is, that it was *Aula Regine*, where it ought to be *Aula Scholarium Regine*, but good, for the true name of the Colledge is so, for the word *Scholarium* is not necessary, but once, and if it be taken in construction to come after *Aula*, the provost will be the sole Corporation, by the name of *Præposit. Aula Scholar. Regine. Ergo*, it doth precede in good construction. Also, the Founder named it so, and so it hath been alwayes taken, and if there be a small variance, this is not to the purpose, if it be so described that another cannot be meant, as a Gift *Omnibus filiis I. S. or filie I. S.* when there is but one, or if *Richerus* Abbot of *W.* grant by the name of *Richardus*; *Nihil facit error nominis cum de corpore constat*, and this was the ancient and constant Opinion in Case of Corporations. See the Case of the Maior and Burgessees of *Lin* in the Tenth Book.

Henry Harpur's Case, 12 Jacobi, fol. 23.

IN *ejectione firma* upon a Lease to *I. W.* in *annam capellam*, and Land in *W.* in the Parish of *B.* and Tithes, without shewing the certainty of them, the Visne was from *B.* the Case was, Sir *H. B.* seized of *G.* of the value of 30 l. per annum, and of *N.* of the annual value of 18 l. in capite, covenanted to stand seized to the use of him and his wife in tail, with remainders in tail, the reversion to himself, and after purchaseth Lands in socage, and deviseth them to be sold by his Executors: the matter in Law resolved, but no judgement given, because divers exceptions taken, &c.

1. *Resolv.* That if tenant of the King in capite, conveys

veys his Land to one of the uses, &c. and after purchase socage, he may devise all the socage.

2. A seek reversion upon an estate tail shall hinder the devise of socage Land for a third part.

3. Although the reversion in fee continue in him, yet he may devise two parts of the socage, and all if he had granted the reversion over.

4. Although he had exercised his power in making a Joynture of more than two parts, yet if the reversion in fee had not hindered, he might have devised all the socage purchased after, howsoever the devise is good for two parts; for the reason reported in *Lovey's Case*.

5. Although the consideration of advancing his Wife and their issues, extends not to the Brothers, yet the use is well raised to them, because the Law implyeth a consideration, and it is not to the purpose that they are found Brothers, because it appeareth in the Deed.

6. For the Mannor of G. the estate tail vanisheth by the death of Sir H. without the issue male, and therefore that estate is no cause to restrain the devise for any part, but the reversion in fee is for a third part: so resolved, that the Plaintiff shall have judgement for two parts. Exceptions to the Count and Visne.

1. The *Ejectione firme* is of Tithes, without shewing the kinds of them. *Ergo*, not good, for a certain judgement and execution cannot be made. 2. It may be it is in a *modus decimandi*, for which an *Ejectione firme* lyeth not.

2. *Capella* is demanded, which ought to be demanded by the name of an House.

3. The *Venire facias*, is not well awarded, for it appears that there are two B. one a Ville, the other a Parish, and W. a Ville in the Parish of B. and the

Tithes are alledged to be in W. *in parochia de B.* so the Visne must be out of B. and W. because there is the most certainty ; so that by reason of these exceptions, no judgement was entered : but it was said that the Court of Wards, where a bill depends for this matter, will take order for the possession accordingly.

Henry Pigots Case, 12 Jac. fol. 26.

B. W. brings debt upon Obligation made to him when he was Sheriff. omitting the name of his Office, but it was after interlined by a Stranger, the Defendant pleads *Non est factum*, without oyer of the Deed ; and judgement was given for the Plaintiff.

1. When a Deed is rased, the Obligor may plead *Non est factum*.

2. If a Deed be rased by the Obligee himself in a place not material, it is void, but not if done by a stranger, except in a place material, and here it was in a place not material, because it appeareth not to the Court that he was Sheriff. If a Deed consist of divers parts whereof one doth not depend upon the other, and some of them are against Law, the Deed is good in part, but if any of them be rased, it is void in all, so if the Seal of one be debruised, all is void : See *Matthewsons Case* in the fifth Book.

*Alexander Powlters Case, 12 Jacobi,
fol. 29. Indictment.*

A. P. *felleo animo*, burned a House in *New-Market*, whereby the greatest part of that Town was burned.

Resolv. He shall not have his Clergy, for this was felony

felony by the Common Law, and so hainous, that he was not replevisable, no more than for Treason, as appears by *Westm. 1* cap. 15. but he shall have his Clergy at the Common Law, for impediments to have Clergy, were first disability to be a member of holy Church, as a blind man, or woman.

2. Heresie.

3. Infidelity, as a Saracen or Jew, but a man excommunicated, or outlawed, shall have it.

4. Confession before the statute of *Articuli Cleri*, c. 15. because he cannot make his purgation.

5. High Treason, or petit Treason before 25 E. 3. cap. 15. So of Sacrilege, and of *insidiatores vicarum, & depopulatores agrorum*: See the statute of 4 H. 4. cap. 2. but the statute of 23 H. 8. cap. 1. taketh away Clergy where one is found guilty of burning of Houses, but this is to be intended by Verdict or Confession; but if he stand mute, or challenge more than he ought, or be outlawed, these are out of the statute; or if he commit Burglary, and not Robbery, he shall have his Clergy; by 25 H. 8. cap. 3. he who is found guilty of any of the said offences shall lose his Clergy; and if he stand mute, or challenge above his number, but that extends to the principal only in case of Indictment, and not to the accessory before the fact, nor to appeals or approvements, nor to outlary; but these two statutes were taken away by 1 E. 6. cap. 12. but 25 H. 8. was revived, by 8 & 6 cap. 10.

Obj. That the said statute was not revived in all, but as to stealing of goods in one County, and flying into another, for so is the style of the Act.

2. If it be revived, this takes not away Clergy, where one is found guilty by Verdict; but the statute of 23 H. 8. which is not revived. But it was resolved that the intire Act is revived.

1. Although that the statute of 5 E. 6. reciteth those offences solely, and reviveth the Act and Clergy, touching such offences, that shall be intended such in mischief; so *Westminster*, 2 cap. 5. is expounded touching Infants having advowsons, whether they be in ward or not; and the style is not to the purpose, for many statutes are of greater extent than the style, as 27 H. 8. of uses concerning Joynitures: yet the preamble is of transferring uses into possession also, otherwise these words and every clause, &c. shall be surplusage, if it extend not to all the act, for there is but one clause in it which concerneth the offences in 5 & 6 E. 6. Also it is that every Article concerning Clergy as to such offences shall be revived, and there is but one which concerns these offences; and many times penal statutes are taken by Equity, as 8 H. 6. cap. 12. ordaineth that the Imbezeling or withdrawing a Record, whereby a judgement may be reversed, shall be Felony, and by Equity, making of a bad judgement good, is Felony; so 25 E. 3. for killing of a Master extends to the Ministers.

2. 25 H. 8. takes away Clergy, where one is found guilty by Verdict, because it takes away if he stand mute or challenge, &c. in like manner as if he were guilty after the Laws of the Land, which are affirmative words: And 4 & 5 Phil. & Mary, cap. 4. takes away Clergy from the accessory before, which they would not have done, if they had not thought that it was taken away from the principal by the other Act. By 18 Eliz. cap. 7. Clergy is taken away in case of Burglary, where he is found guilty by Verdict, Confession, or Outlary: but if he be indicted at the Common Law, and stand mute, or challenge over, &c. he shall have it, and not if he be indicted by 23 H. 8. or 5 E. 6. of Burglary, and put

put them who were in the House in fear with Robbery, or upon 1 E. 6. without Robbery : 4 & 5 Phil. & Mary, takes away Clergy, where one is accessory before to a Robbery in a dwelling House; *Ergo*, before that such an accessory shall have it: Breaking of an House in the night without Robbery, is no Burglary, and if he doth rob, he shall have his Clergy, if none were put in fear, or that any of the Family (and not a stranger) be not in another part of the House; but this was before 39 Eliz. cap. 15. whereby Clergy is taken away without putting any in fear, if he rob any man of above the value of five shillings.

Accessory before in robbing a House in the day is ousted of Clergy by 4 & 5 Phil. & Mary. Accessory in robbing a Booth in the night or day, or out-house upon 39 Eliz. shall have his Clergy: *Nota*, Although a statute takes away Clergy from the principal, yet the accessory before or after, shall have it; and where by statute or any offence a man is ousted of his Clergy, the Indictment must contain the offence, with the circumstances in the statute: *Dyer*, 99. and 183. And A. P. was ordered to be hanged in Chains, &c.

Metcalfs Case, 12 Jacobi, fol. 38. In Accompt.

Judgement is given against M. *Quod computet & reddo in misericordia quia prius non computavit*; and before final judgement, Error is brought.

1. *Resolv.* It lyeth not: 1. Because the Writ of Error saith, *Si iudicium inde redditum sit*; which shall be intended of the principal judgement, at the Feast of St. M. shall be intended the principal Feast, and the Feme shall be received upon default of her Ba-

ron after judgement of admeasurement before the principal judgement.

2. It shall be intended an intire judgement, therefore in action against two, if one plead to the issue, and the other confesseth, and judgment given against him, he shall not have error before the Plea determined against the other, for otherwise there would be a failer of right: for the Kings Bench cannot proceed upon the Record, nor the Common place, because it is removed.

3. The first judgement is not *ad grave damnum*, for by that he loseth nothing, but judgement of the Attorages and damage is in the end of the original.

4. This is not properly a judgement, but an award of the Court, as ouster of aid, *in petitione facienda* an award, *quod partitio fiat, &c.* which are but interlocutory, and not definitive.

5. They have day by the Roll until the last judgement; but if a Felon dye after the exigent awarded, and before Attainder, a Writ of Error lyeth for necessity, for otherwise the goods are forfeited by awarding of the exigent without remedy; if divers are sued by several *Præcipes*, and judgement given against one, he shall have error before judgement given against the other; and if Error be in the original, the tenor only shall be certified, for otherwise the Court cannot proceed against the others.

2. It was resolved, that the Record is not removed, because until final judgement be given, the Chief Justice of the Common place hath no authority to send it, and they may proceed, notwithstanding the Roll be marked *Militur*.

Richard

Richard Godfreys Case, 12. Jacobi, fol. 42.

TWELVE Chief pledges according to the custom of the Mannor, to present to the Leet, that every one of themselves ought to pay for themselves 10 s. *pro certo letæ*, the Steward imposeth a Fine of 6 l. upon them, the Lord distreineth for the Fine, and certainty of Leet, one of the pledges brings Replevin, and judgement was given against the Plaintiff.

1. *Resolv.* The Fine is not well assessed, for it ought to be several, and not joint as it is, because the offence is several, and although that the offence be joint, yet the Fine shall be several, as in Disseisin and Trespass: But for the incertainty of the persons, and infiniteness of the number, many may be fined together, as the Town for the escape of a felon; and the reasonableness and excessiveness of the Fine shall be determined of the Judges: *Excessus in re quilibet jure reprobatur communi*, as excessive distress, excessive aid, and excessive amerciamment are against the Common Law.

2. If the Fine be imposed erroneously, it may be avoided by Plea, for he had no other remedy.

3. The Lord cannot distrein *pro certo letæ*, without prescription, because it is against common right, but he may for a Fine or amerciamment; but for an amerciamment in a Court Baron, the Lord must prescribe; a Fine because it is assessed by the Court, needs not be asserred, but an amerciamment must be asserred by the Country.

4. Admitting that he may distrein *pro certo letæ*, he shall have a return, although he had no cause to distrein for the Fine, for where one brings an Action for two things, and it will not lie for one of them,

them, it shall abate only for that if he cannot have a better action for it, but if he may it shall abate for the whole; as in a *Formedon* of Land, and of an Avowson, the Writ shall stand for the Land; so if a man avow for divers Rents Arrear, and it appeareth, that parcel is not yet due, yet the avow is good for the residue; but if a man bring a Writ of Entry in nature of an Affize of two Acres, where it appeareth, that for one acre he ought to have a Writ of entry in the *per*, there all shall abate, for this extends not to the action, but to the Writ only.

Richard Lifords Case, 12 Jacobi, fol. 46.

IN Trespass, the Defendant pleads that *F. L.* was seized in fee, and demised to *T. S.* and *M. P.* (excepting Trees above 21 yeares growth, if not decayed) for their lives, and covenanted to stand seized de *tenementis prædictis cum pertinentiis superius dimissis*, to the use of *R. L.* in tail, &c. and the Defendant as servant to the said *R. L.* entered and sold Trees; and judgement was given against the Plaintiff.

1. *Resolv.* That the Trees notwithstanding the exception, remain parcel of the Inheritance, and are not Chattels, but shall descend to the Heir, for the Law doth not favour severance of the Trees from the Land: therefore if one bargain and sell Land, upon which there are Trees, they shall not pass without inrollment.

2. If there had not been such an exception, the general interest of them is in the Lessor; and the Lessee had but a particular interest in them, and the Lessor may sell them without license of the Lessee, to take effect after the lease determined; and Fines shall not be paid for them, because they are parcel
of

of the Inheritance 2. By the exception of them, the soyl is not excepted, but only so much as sustaineth the Trees, and if he by license of the Lessee root them up, the Lessee shall have the soyl, but by exception of Wood, the land it self is excepted: if an Acre, or an Advowson be severed from the Mannor by exception upon a lease for life, it shall not be parcel of the Mannor again; otherwise of Trees, for they were not severed *in facto*, because they grow out of the Land.

3. A thing in possession cannot be parcel of a reversion upon an estate for life, but Trees which grow out of the land, and Fish or Dear in the land, may, and shall pass with it.

4. In this Case by grant of the reversion generally, or of the Tenements, the Trees pass, for the Inheritance of the land passeth, and thereby the Trees annexed to it; the Disseisee by his entry shall have the Corn upon the ground, as well as the Grasse, by relation of continuance of possession, but this relation is not of effect to have a Trespass against any, but the first Disseisor; for, *In fictione juris semper equitas existit*, and the emblements shall be recovered in damages.

5. In the Case at Bar by exception of the Trees, power is reserved to the Lessor or his servants, to enter and shew the trees to the Vendee: *Cuiusque aliquid concedit, concedere videtur & id, &c.*

6. The Plea in Bar is insufficient, for he sheweth that there was another Joyntenant for life not named in the Writ, and demands judgement if action, which is an apt conclusion.

2. The Plea is double, one to the Writ, another to the Action.

3. He pleads the entry of the lessees for life, which is surplussage.

4. He

4. He averreth not that the Trees which were sold were not Dotards, which are excluded out of the exception; but that they *de jure pertinebant* to R. L. which is not formal: but upon all the matter here appeared sufficient cause to give judgement against the Plaintiff, and therefore by the rule of the Court, *Querens nil capiat per billam.*

The Case of the Taylors of Cloaths, &c. of Ipswich,
12 Jacobi, fol. 53.

THe Taylors of I. make an Ordinance that none shall exercise the Trade in I. if he hath not been an Apprentice for seven years, and if he do not appear before them to be approved, upon forfeiture of five Marks, and for breach of it, bring debt; the Defendant pleads that he was retained by A. P. to be a domestick Servant, and that he made Garments by his command.

1. *Resolv.* At the Common Law, none may be prohibited to exercise any Trade, although he hath never been an Apprentice, and be ignorant; but if he misdo any thing, an action of the Case lyeth.

2. This Ordinance for so much as is not prohibited by the statute of 5 *Eliz.* is against Law, for after seven years Apprentiship, he may exercise his Trade without allowance of any.

3. The statute of 5 *Eliz.* doth not prohibite the private exercise of any Trade in a Family, therefore this is out of the said Ordinance.

4. The statute of 19 *H. 7. cap. 7.* doth not corroborate any Ordinance against law, if it be allowed, but the allowance dischargeth the penalty of 40 *l.* for putting in use any Ordinances which are against the Prerogative of the King, or the common profit of the people; and judgement was given, *Quod querentis nil capere per billam.*

Edward Savells Case, 12 Jac. fol. 55.

AN *Ejectione firme* lyeth not of a Close, but it must be of a certain number of Acres, and the nature of them must be shewed; A Writ shall not abate for want of Order, *Viz.* Of a House before Land, &c. and judgement was stayed.

Benthams Case, 12 Jac. fol. 56.

IF damages or costs are omitted, or not well assessed by the Jury, if the Plaintiff release them, he may have his judgement, and it shall not for that be reversed: Insufficient asselsment of damages, and no asselssing, is all one.

Doctor Fosters Case concerning Recusants,
12 Jacobi, fol. 56.

AN Information was preferred against a Recusant by an Informer, *Tam pro domino Rege quam pro seipso*, before the recusant was convicted for 220 l. that is 20 l. a Month for a 11 Months absence from the Church, &c. And judgement was given against the Defendant.

1. Resolved, That he may be convicted (to satisfy the statute of 23 *Eliz.* in this same sute, and convicted shall be taken for attainted) for he shall forfeit nothing before judgement.

2. The Branch of distribution in the Act of 23 *Eliz.* extendeth as well to the Clause of penalty for recusancy, as to that of hearing or saying Masses, for it is all one to say, shall forfeit, and shall forfeit to the King.

3. Divers Acts of Parliament give the penalty to the

the King, and yet after make a contribution thereof to another who will sue, as 3 H. 6. cap. 3. & 3 H. 7. 3.

3. He against whom judgement is given, upon demurrer or default, or otherwise, is convicted within the statute, for he is attainted which implyeth it, for it is so found by the Judges: so by the statute of 3 H. 6. treble damages are given where a disseisin is found to be with force, this extends to judgement by *Nihil dicit*, or default.

4. The statute of 28 Eliz. doth not take away the statute of 23. which giveth liberty to the Informers, &c. For,

1. It is made for a more speedy execution of it.
2. It doth not alter the sute of the party, but of the King, and leaveth the Informer as he was before.

3. The Act of 28 giveth not the penalty to any new person, for it was given to the K. by 23 El.

4. The statute of 28 extends only to Indictments, and toucheth not Informations.

5. The Defendant is not within 28 Eliz. if he be not convicted at the sute of the K. *Ergo*, this is left as before.

6. Because the statute is in the affirmative, and they may stand together; but the statute of 28 alters the statute of 23 in this, that it confineth sutes against Recusants in the K. Bench, or Assizes, &c. which clause extends as well to the sute of the Informer, as of the Queen; and the statute of 25 Eliz. & 3 Jacobi, enlarge the jurisdiction, as to the sutes of the K. and touch not the sute of the party.

5. The statute of 33 taketh not away the Action popular given by 23. for it was made to give more speedy remedy, and not to take it away; a feme Coverr is within the statute of 23 and 1 Eliz. but before

fore the statute 35 *Eliz.* If a Feme-Covert had been indicted of Recusancy, the forfeiture should not have been levyed of the goods of the Husband, because he was not party thereunto; otherwise in an Information or Debt brought by the Informer; and in that the statute of 33 is, that the K. shall recover all the pains, &c. in such sort, &c. This alters the remedy only, as to the Queen, for now she may proceed by action, as for recovery of any other debt by the Common Law, in such manner as 1 *H. 7. c. 1.* giveth a Formedon against Parner of the profit, &c. Also 35 *Eliz.* is in the affirmative, and although it giveth the penalty of 20 *l.* by the Month, yet it taketh not away 1 *Eliz.* which giveth 12 *d.* for every Sunday and Holy day; and where this statute saith, that the convict on shall be in the K. B. or at the Assizes, yet the Justices of Peace and others authorized by 23 may take Indictments: the statute of 3 *Jacobi*, inflicteth imprisonment upon the Feme-Covert, yet it taketh not away the forfeiture before: where a new person is designed by a new statute, this taketh away the antient statute if they cannot stand together, and although there are exclusive words concerning Courts, yet the Court of K. Bench is not excluded, because it is *Coram Rege*.

6. A Recusant may plead *Antefoits convict.* or other collateral bar, as pardon, submission, &c. out of the Indictment; for 3 *Jacobi, c. 4.* extends only to defects, within the Indictment or other proceedings, and the Informer cannot charge any who is convicted before at the sute of the Queen, upon 23 or 35 *El.* or 3 *Jac.* and upon 23, the Informer must sue within a year and a day.

Nota, If after a popular act commenced the K. Attorney will not prosecute, the Informer may for his part, and condemnation or acquittal at his sute, is a bar

bar against the K. and all others, yet the K. may pardon it before an Action commenced, and if the Informer dye, the Attorney may prosecute the sute, and the Information shall serve for the King.

[*The Case of the Master and Fellows of Magdalen Colledge in Cambridge, 13 Jac. fol. 60.*]

DOCTOR K. Master of M Colledge, and the Fellows 17 *Eliz.* grant to the Queen, reserving rent, upon condition to grant over, which is done accordingly; The Jury find 13 *Eliz.* of Deans and Chapters: and 13 *Eliz.* of Confirmations, a fine with Proclamations is levied, and five years pass: Doctor K. dyeth, the successor accepts the Rent, and within five years after his Election enters, and he and the Fellows demise to the Defendant. And judgement given for the Defendant.

1. Resolved, the Master and Fellows are restrained by the statute of 13 *Eliz.* to grant to the Queen, for the Q. is a Person within the Letter of the statute, and if he should be exempted, this should be by construction of Law, which cannot be.

1. Because a general statute for maintenance of Religion and good literature, or relief of the poor, binds the K. although he be not named; and it appeareth by the statute of 1 *Eliz.* that the K. is included within the words Person or Persons, for there he is exempted.

2. Because the statute is made to suppress a Tort, therefore the statute of *Donis* binds him.

3. A statute made to perform the intent of the Donor binds the K. without being named, as the statute of *Donis*.

4. The Master and Fellows are disabled to grant, therefore the K. cannot purchase of them.

5. The

5. The intent is to be observed, which was to convey by the Queen to a subject, and so to make her an Instrument of wrong, as one who holdeth of the Bishop grants to the Queen to re-grant to a Corporation by Covin, to take away the Seigniorie of the Bishop by extinguishment, and to make an Evasion out of the statute of *Mortmain*; this Patent shall be repealed *Jure Regio*, so here : and this act extends to a Corporation, not incorporate by such names as are in the statute.

2. The statute of 18 *Eliz. c. 2.* doth not confirm this grant; for it is out of the words of the statute, because it is not made upon consideration; and here the reversion of the Rent is not considered, because the Queen was to grant it before the Rent be due; two grants to the King may be void or voidable.

1. In respect of the Grantor, as if an Infant grant unto him.

2. In respect of the thing granted, as if a Foundership be granted.

3. In respect of the estate, as tail.

4. In respect of the grant, if it agree not with the rules of Law.

5. In respect of omission of any circumstance, as Inrolment; this statute aideth not grants of the first sort, for it doth not inable persons disabled by the Law, to grant as here, nor of the second sort, but confirmeth grants of Tenants in tail, because he was able to grant, but aids not grants of the fourth sort : For, *quia malo sunt inchoata principio, vix est, &c.* but it aideth grants of the fifth sort,

3. At the time of the said statute this grant needed no confirmation, because Doctor K. the Master, was living

3. The fine and Non-claim doth not bar them.

1. Because, although it was not a conveyance made

by them, yet it was suffered by them within the words of the statute.

2. Doctor K. nor any in his time cannot make his claim, and claim was made within five years after his death.

4. Acceptance of the rent doth not barr them, because it is a body aggregate of many, and acceptance by the Master sole, doth not barr all; and the rather being without deed: And judgment given, *quod querens nil caperet per billam.*

Lewis Bowles Case, 13 Jac. fol. 79. In Trover and Conversion.

T. B. covenants to stand seised to the use of himself and his Wife for life, without impeachment of waste, the remainder to the first, second, and third Son, successively in tail, the remainder to the heirs of their two bodies, the remainder over, they have issue I. T. B. dyes, the issue dyes, the wind bloweth down a Barn, a parcel of, &c. and the Timber in the Count mentioned, was parcel of that Barn; the Feme carrieth the Timber out of the Mannor, he in remainder assigns by fine to the Plaintiff; the Feme dyeth, the Plaintiff brings an Action of Trover and Conversion against the Executors of the Feme; and judgment given against the Plaintiff.

1. Resolv. Until the birth of the issue, T. B. and his Wife, have an estate tail executed; but after this, it is divided, and they have for life, the remainder to the issue in tail.

2. Tenant in tail after possibility, had a greater estate as to the quality, than Tenant for life: Therefore,

1. He shall not be punished for waste.

2. He

2. He shall not be compelled to attorn.
3. He shall not have aide.
4. Upon his alienation à *consimili casu* lyeth not.
5. After his death Intrusion lyeth not.
6. He may joyn the Mife upon the meer right.
7. He shall not be named in an Action for, or against him, Tenant for life, but not as to the quantity; therefore his feoffment is a forfeiture, receit lyeth upon his default, and exchange by him, and Tenant for life is good.
3. The Feme is not Tenant in tail after possibility, &c. for this must be a remainder of an estate tail by act of God, and not by limitation of the party: and though she be Tenant in tail after possibility of the remainder; this doth not extinguish the estate for life, because it is not a greater estate.
4. She shall have the priviledges of Tenant in tail, after possibility, for the inheritance which was in her; and because she is Tenant in tail after possibility of the remainder, although she cannot claim it in possession.
5. If Tenant for life or years cut Trees, or prostrate Houses, the Lessor shall have the Trees and Timber; for the Lessee had them only as things annexed to the Land, and he shall not have a greater interest by his tortious severance, but he shall have a special interest in the Timber blown down, to build again withall.
6. The Law giveth many priviledges to a Mansion-house.
7. The Lessee without impeachment of waste, shall have Trees which he cuts; for, without impeachment of waste, is as much as without demand for waste done; otherwise it is, if it be without impeachment, &c. by Writ of waste.
8. The priviledge of without impeachment of waste

is annexed to the estate; therefore if he accept a confirmation of a greater estate, or assign over, it is gone.

9. If Trees are blown down with the wind, the Lessee without impeachment of waste shall have them; therefore judgment given, *quod querens nil caperet per billam.*

The Case of Monopolies, 4 Eliz. fol. 84.

THE Queen grants to one of the Privy-Chamber, the sole making and importation of Cards; this Grant is void.

1. The grant of making of Cards is void: For,
1. All Trades are for the publick good, for the exercise of Youth in labour, and therefore it cannot be appropriated to one solely.

2. A Monopoly hath three Incidents against the Weal-publick.

1. Raising of the price.

2. The Commodity is not so well made.

3. The impoverishment of poor Artificers.

3. The Q. is deceived in her grant, because she thought it to be for the publick good: It prohibits them who have skill to make Cards, and giveth licence to one of the Privy-Chamber, who had not skill; and the K. cannot suppress Card-playing, because it is not *malum in se*, and no trade may be prohibited but by Parliament.

2. The Licence of importation of Cards is void, being without limitation or stint; for the Q. may dispense with the statute of 3 E. 4. c. 4. which doth prohibit it, but that ought to be with limitation.

Nota, The K. that now is, in a Book Printed 1610. hath published that Monopolies are against law, and commanded no suter to presume to move him

him for the granting of them : But admitting the grant good in the Case at bar, the Plaintiffs sole remedy had been that which 3 E. 4. in such case giveth, and that ought to be pursued; and judgment entred, *quod querens nil caperet per billam.*

The Earl of Devonshires Case, 4 Jac. fol. 89.

THe K. reciting that decayed Munition belongs to the Master of the Ordinance, grants it unto him, who sells it, and dyeth, his Executors are chargeable to the K.

1. Resolved: This cannot be claimed as fees of the Office, because it was erected but in 33 H. 8.

2. The grant is void, because it was upon a suggestion, that it was due to him.

3. Although the Testator claims them to his own use, yet he shall be accountable to the K. for the Law will make a privity; as if any man taketh the K. goods, he shall be charged in an accompt; for the K. is not bound to charge any man as receiver, but generally; and otherwise the King may lose them by his death; and although the Kings goods came not to the hands of the testator, yet he shall be charged, if he were a means of the Kings damage and prejudice.

In Sir W. M. Case it was resolved, That no Officer of the K. can dispose of any part of the K. treasure, for the profit and honour of the K. without warrant under the great and privy Seal, and after the Executors satisfied the K. for the said Munition.

*James Baggs Case, 13 Jac. Bancō Regis, fol. 93.
In restitution.*

1. **R**esolved : That to the Kings Bench authority belongs, not only to correct errors in judicial proceedings, but other errors and misdemeanours extrajudicial, tending to the breach of the peace, or oppression of the subject.

2. Causes of disfranchisement of a Citizen ought to be acts against his duty and Oath, but words against a Chief Magistrate are not, but may be of the good behaviour, and so of an attempt without an act done.

3. A Citizen cannot be disfranchised without Charter or Prescription, if he be not convicted by due course of Law ; as if he be attainted of forgery, perjury, or conspiracy at the K. sure, or of any other crime whereby he becometh infamous.

4. If a Citizen is disfranchised, and hath a writ of restitution, and they return sufficient cause, which is false ; a writ to restore him shall not be awarded, but he may have a special Action upon the Case.

5. Such a return ought to be certain, because the party cannot have an answer unto it, and after the Court awarded a Writ to restore the said I. B. and so he was accordingly.

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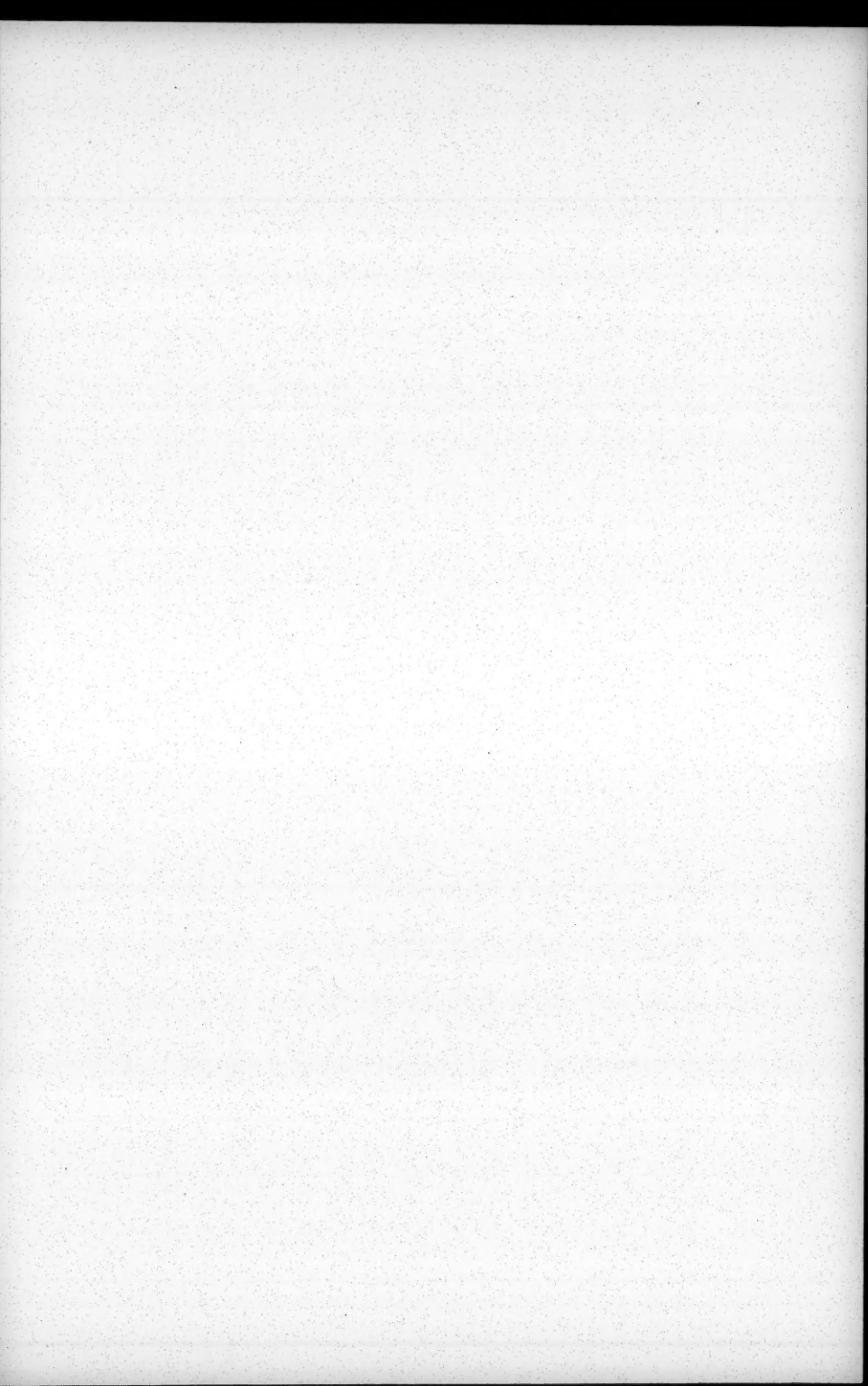
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